90-765

No. _____

In The

Supreme Court of the United States

October Term, 1990

THE LEXINGTON HERALD-LEADER COMPANY
and JOHN S. CARROLL,

Petitioners,

vs.

REGGIE WARFORD,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

EDWARD O. DELANEY
KENNETH H. INSKEEP
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204

ROBERT F. HOULIHAN, JR.
JAMES L. THOMERSON
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507

RICHARD J. OVELMEN
(Counsel of Record)
LANDON K. CLAYMAN
BAKER & MCKENZIE
Suite 1600, Barnett Tower
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 789-8900

– Attorneys for Petitioners –

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether a libel plaintiff must always be deemed a "private figure" with respect to a news report addressing his involvement in a national public controversy, unless he also is involved in a relevant preexisting local controversy in the community where he resides?

Whether a libel plaintiff, who by his conduct and position assumes the risk of public scrutiny in regard to a national public controversy, must nevertheless be deemed a "private figure" if he has not "spoken out" to influence the resolution of a relevant preexisting local controversy?

Whether in a libel suit involving speech of public concern the federal constitutional requirement of "falsity" limits the authority of trial courts to exclude, on common law grounds, evidence which corroborates the truth of the news report sued upon?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 LIST

The following is a list of the parties appearing in the proceedings in the Kentucky courts and the Rule 29.1 list of parents and subsidiaries:

Petitioners

The Lexington Herald-Leader Company
John S. Carroll

Parent of Petitioner

Knight-Ridder Inc. (parent of The Lexington Herald-Leader Company, which has no subsidiaries)

Respondent

Reggie Warford

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The opinion of the Supreme Court of Kentucky is reported at 789 S.W. 2d 758 (Ky. 1990) and is reprinted in the appendix hereto. (App. 1-39).

The memoranda opinions and directed verdict judgment of the Fayette County, Kentucky, Circuit Court (Keller, J.) have not been reported, and are reproduced in the appendix hereto. (App. 41-54).

JURISDICTION

The Supreme Court of Kentucky rendered its opinion April 26, 1990, and entered the order denying the timely petition for rehearing June 28, 1990. (App. 40). On September 13, 1990, petitioners made a timely motion for an enlargement until November 10 of the time in which to file a Petition of Writ of Certiorari to the Supreme Court of Kentucky. On September 17, 1990, Justice Scalia ordered that the time for filing this petition be extended to and including November 10, 1990.

The jurisdiction of this Court to review the decision of the Supreme Court of Kentucky is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America states in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the Constitution of the United States of America provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In October 1985, the *Lexington Herald-Leader*, a daily newspaper published in Lexington, Kentucky, home of the University of Kentucky, ran a series of news articles reporting the national public controversy over the recruiting of student athletes by major academic institutions throughout the country. The series was awarded the Pulitzer Prize.

A. Publication Of The NCAA Reprint Addressing The National Public Controversy Surrounding The Recruitment Of College Athletes

In January 1986, the *Herald-Leader* issued a special "NCAA Reprint" which republished edited versions of fourteen articles, editorials, cartoons, and columns, including the articles from the award-winning series. The NCAA Reprint provided a month-by-month summary of 1985 news reports recounting more than two dozen major recruiting scandals at institutions of higher education such as Kentucky, Vanderbilt, USC, Georgia, Baylor, Tulane, Arizona State, Tennessee, Florida, Creighton, SMU, Auburn, and LSU. Prominent professional athletes stated on the record that when they were being recruited in high school they had been paid, or were offered payments, by various colleges and universities. In one of the two leading articles reprinted, thirty-three former University of Kentucky basketball players were interviewed, and twenty-six stated they had participated in violations

of the rules of the National Collegiate Athletic Association ("NCAA"). In the other lead article, dozens of top basketball recruits from the prior two years were interviewed, with one out of every five stating he had received improper offers and inducements from schools across the nation. (Pl. Ex. 12).

The NCAA Reprint was sent to the presidents, athletic directors, faculty advisors, and basketball coaches of all NCAA Division I and II member schools. It also was sent to NCAA committee members and officials, one hundred of the country's leading newspapers, *Sports Illustrated* magazine, and various television stations. Copies were distributed at the NCAA convention in New Orleans. (App. 3; Tape 10, 1/24/89, 09:30:19-09:38:09).

The NCAA Reprint explored many dimensions of the student-athlete controversy. It reported the results of opinion polls asking the public whether college athletes should be paid by schools for their services (67% said "no"); whether the University of Kentucky placed too much emphasis on athletics (45% "yes", 49% "no"); whether more emphasis should be placed on academics (74% "yes"); and whether most schools violate NCAA rules (50% "yes"). The Reprint outlined reasons the NCAA rules should be followed: NCAA rules violations are "giving young men a backward civics lesson"; colleges, whose mission is to teach the young, are teaching them to ignore rules and to get ahead by cheating. On the other hand, the NCAA Reprint also noted the lack of support for NCAA rules because they were perceived as "unfair, unrealistic, or simply a joke." It reported that a majority of College Football Association ("CFA") coaches believed players should receive a monthly allowance. (Pl. Ex. 12).

Another aspect of the national recruiting controversy, as summarized by the testimony of Richard E. Lapchick, of the Center for the Study of Sport in Society at Northeastern University, was that "institutions of higher education which are presumably there to educate people who come to those institutions weren't doing the job with student athletes." (R.O.A. depo. vol. 16 at 8). Professor Lapchick explained that schools "were recruiting athletes, frequently illegally, frequently with illicit promises and illicit payments, teaching a value system to those athletes coming in that was certainly different from the philosophical base of the university to begin with." *Id.*

He noted the disturbing misrepresentations colleges used to induce athletes, especially poor blacks, to matriculate:

> They were promising that they'd get an education after four years and still 27% of Division I basketball players and 30% of Division I football players today actually get a degree.
>
> Clearly, that promise was not being delivered, and the worse fallout is at the high school level where it's estimated that young people who are pursuing the dream of making it to the professional level or even the college level are not understanding that the odds are 10,000 to one that they'll make it to the pro level or 100 to one that they will even play in college.

(*Id.* at 8-9).

Editorials republished in the NCAA Reprint examined these aspects of the controversy, including the extent to which colleges were exploiting the student athlete. One editorial commented that the athlete is "the mainspring of an industry that turns over hundreds of millions of dollars. His skills are essential to a gigantic merchandising system that hawks game tickets, beer, automobile tires, insurance, hardware, after-shave lotion and countless other goods to fans from Key West, Fla., to Nome,

Alaska." (Pl. Ex. 12). Yet, the athlete is not supposed to be paid. He gets his "educational fees," but studies show the athletic programs put such extraordinary time demands on athletes (often more than 60 hours per week), that they have no time for real study. Instead, the universities reduce the course load for eligibility and create an athletes' "curriculum" that provides no real education. (R.O.A. depo. vol. 16 at 16, 41-43); M. Sperber, *College Sports, Inc.* 6-10 (1990). The goal of escaping the slum or the ghetto through a college athletic scholarship is often an illusory promise, known to be false when made by the college recruiter to the high school athlete and the athlete's family. *Id.*

The NCAA Reprint addressed a national public controversy concerning recruitment of athletes, the proper regulation of recruitment activities, whether NCAA recruiting rules and regulations were enforced or even enforceable, the parties who were not complying with the regulations, the need for public awareness of violations, and the proper role of athletics in the life of colleges and universities. In the final analysis, the *Lexington Herald-Leader* study of the college athlete recruiting controversy called for a reform of NCAA rules and regulations which would recognize and address the hard realities, not the myths, of athletes trying to earn a college education by participating in intercollegiate athletics. (Pl. Ex. 12).

B. The Libel Suit Concerning The Report Of The Warford/Miller Incident In The NCAA Reprint

The original articles and the NCAA Reprint were not popular in Lexington. The *Herald-Leader* received a "bomb threat," its personnel were threatened by fans of the University of Kentucky, hostile phone calls inundated the paper, other local media attacked it, and a circulation

employee was spat upon. Readers cancelled their subscriptions, and accused the *Herald-Leader* of being a "traitor." (R.O.A. Carroll Tr. 194-95, 233-34). One person, Reggie Warford, sued the newspaper for libel.

The NCAA Reprint contained two balanced references[1] to an allegation of improper recruiting made by a high school basketball player named Steve Miller against Reggie Warford, a recruiter from the University of Pittsburgh. Steve Miller was not just an ordinary high school basketball player. He was selected Kentucky's "Mr. Basketball" for 1983-84, the best player of the year in the most basketball obsessed state in the country. (R.O.A. Miller Tr. 8). Reggie Warford was not just any recruiter. Not only was he a former captain of the University of Kentucky basketball team, but he was the first black player in Coach Adolph Rupp's nationally celebrated basketball program to have graduated. (Tape 2, 1/10/89, 08:36:12-08:36:17).

The two references to Warford in the 16-page NCAA Reprint, both of which were sued upon, are reproduced below in their entirety:

> Steve Miller, a heavily recruited forward from Lexington's Henry Clay High School, said that assistant coach Reggie Warford of the University of Pittsburgh offered to split some money with him.
>
> Warford "said that if he signed the top player out of Kentucky that he would have a raise and that I would benefit from that raise also," Miller said.

---

[1] Because a prior decision of the Kentucky Supreme Court repudiated the neutral reporting privilege, that defense was not pressed in the courts below. *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W. 2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982).

> Warford, a former University of Kentucky player, acknowledged that he told Miller that signing him "would be a recruiting feather in my hat." But he denied offering Miller any money.

(Pl. Ex. 12 at 3).

> Pittsburgh Athletic Director Edward Bozik said October 29 that he did not plan to investigate two basketball players' claims that they were offered money to attend Pitt but said he would report their comments to the NCAA.
>
> Doug West, now a Villanova freshman, told the Herald-Leader that Dr. Joseph Haller, later a Pitt Trustee, offered him $10,000. Steve Miller, now at Western Kentucky, told the newspaper that Pitt assistant coach Reggie Warford offered him money. Haller and Warford issued denials, and Haller asked the NCAA to investigate West's accusation.

(Pl. Ex. 12 at 14). Warford did not sue on Miller's allegation as it appeared in the 1985 series, but filed a libel suit only after it was republished in the 1986 NCAA Reprint.

Miller and Warford were the only persons present when Warford allegedly offered Miller money. The news report of Miller's allegation and Warford's response was taken from their taped interviews with a *Herald-Leader* reporter. The transcript of Miller's first interview with reporter Mike York states:

> Miller: It wasn't – it didn't happen at Kentucky, but it happened during an incident with Pittsburgh. I was offered like a good summer job. Then I was told that I would be treated nice by the alumni, you know, if – he said if he signed the top player out of Kentucky uh, that he would have a raise and, you know, that I would benefit from the raise also. So, you know.
>
> York: Did you get the impression that you might be getting, getting a cut of that raise or something or?

Miller: Yeah. It was just a lot of, a lot of stuff involved in recruiting. I'm just glad it is over with me.

(Pl. Ex. 19A, at 10-14). He confirmed this statement in a second interview:

York: I've seen a lot of that. Uh, the stuff about you know, the raise and all of that, do you feel that was sort of a kind of a last resort he was using to get you to reconsider or if you thought that was kind of a standard part of what they did? Did you get any feel for that?

Miller: Right. He just basically said that it would benefit me if I signed there at Pittsburgh 'cause of the support that I would get from the alumni and, and other people that gather around the top players that they sign and he said he's not going to allow anything. He would also benefit from it, too, because he uh, he does a good job and that if he signed me, that he would get a raise and he said that we would both benefit from it.

(Pl. Ex. 20A at 3-5). Although subsequent to the initial publication of the allegation Miller publicly denied he made the charge against Warford, he testified under oath at trial and deposition that he had been pressured to retract his statements. (R.O.A. Miller Tr. 170-72, 175, 179). He confirmed that his statements about Warford's offer of money were true, that he told a friend about it, and that Warford promised to "funnel" alumni money to him through a part-time job. (R.O.A. Miller Tr. 45, 46, 49, 101-07, 159, 180-84).

In his interview with York, Warford denied making any offer of money to Miller. (Pl. Ex. 7 at 49-51). At trial he did admit, however, that while recruiting Miller he improperly suggested to a Pittsburgh recruiting aide living in Lexington that she hire Miller for a part-time job. He denied any wrongdoing but admitted his role would have triggered an investigation to determine if NCAA rules were violated. (R.O.A. II Warford Tr. 38, 68-71).

C. How The Federal Questions Were Raised

Because the newspaper relied on the "public figure" defense in answer to the libel complaint, the plaintiff sought an early adjudication of this question by moving for partial summary judgment on the federal question. (R.O.A., Vol. 2 at 230-49). The parties made an extensive record on the "public figure" issue. The facts relating to the public controversy concerning the recruiting of college athletes have been recounted above; Warford's involvement in the controversy is related in what follows.

Reggie Warford was a highly regarded high school basketball prospect in 1972, and was recruited by more than 130 colleges and universities across the country. (R.O.A. Warford Tr. 6). He chose to go to the University of Kentucky, which had one of the most prominent basketball programs in the country, led by the legendary coach, Adolph Rupp. (R.O.A. Warford Tr. 11). Warford was only the second black player in history to enter Kentucky's basketball program, and in 1976 he was the first black player to graduate. (R.O.A. Warford Tr. 6). In addition, he was the team captain in his senior year. (App. 2).

Following graduation, Warford accepted the position of assistant basketball coach at Iowa State, where he became primarily a recruiter. In 1980 he became co-head coach at Iowa State when Coach Lynn Nance resigned in midseason (R.O.A. Warford Tr. 13). Following the 1980 season, he left Iowa State to become an assistant coach in the basketball program at the University of Pittsburgh, under Coach Roy Chipman. *Id.*

Chipman hired Warford because he "wanted someone that was familiar with major colleges and major schedules and recruiting, possibly getting in touch with top notch players." (R.O.A. Warford Tr. 15). Pitt won the

Eastern Eight conference title in both the 1980-81 and 1981-82 seasons, and then it joined the Big East basketball conference. Warford testified the Big East had the largest television contract at the time, that it was a "young conference with great players in a hurry, . . . with a great T.V. package and a host of exposure, and the Big East actually helped make E.S.P.N." (R.O.A. Warford Tr. 25).

Warford explained that an assistant basketball coach "is judged on who comes into the program." He testified that in 1983 he almost was fired by Chipman for not recruiting enough big name players, (R.O.A. Warford Tr. 25), but that subsequently he successfully recruited some very celebrated basketball talent. (R.O.A. Warford Tr. 27). Clearly, Warford's professional success depended largely on traveling throughout the country attempting to attract the nation's best known high school basketball players.

In August 1983, Warford began his campaign to recruit Steve Miller. Warford explained his own motivation to Miller by stating "from the way it looks you're going to be Mr. Basketball in Kentucky. And I said, it will be a feather in my hat – if I can sign the best player out of Kentucky." (R.O.A. Warford Tr. 36). Warford's goal was to become a head basketball coach and the way to become a head coach was to recruit highly publicized "name players." Recruitment of "name players" enhanced a school's reputation and the reputations of the coaches who were responsible for recruiting them. (R.O.A. Warford Tr. 86-7). Thus, Warford's chosen job and profession was to recruit the most famous players in the country to enhance the public perception of his school's program, and his ambition was that his personal success and reputation as a recruiter would lead to a position as a head coach at a Division I basketball program. As he acknowledged in a 1985 statement:

> As a public figure I understand the consequences of being in the public eye. I also know

> that by being in this profession, there are pitfalls and we, as coaches, are in the proverbial fish-bowl. . . .

(R.O.A. Vol. 3 at 453).

D. The Proceedings In The Trial Court

The trial judge twice addressed the "public figure" issue. Initially, he ruled Warford a "private figure" in a memorandum opinion issued in response to Warford's early motion for partial summary judgment on the federal question. (App. 44-48). The trial court concluded Warford was not a "limited purpose public figure," first because the evidence adduced in discovery to that point suggested recruiting was not a major part of Warford's job and no controversy as to recruiting existed *"at Pittsburgh when the plaintiff was hired."* (App. 46). And "Second, the plaintiff clearly did not thrust himself into any controversy regarding illegal recruiting nor did he attempt to influence its outcome." (App. 47-48).

Approximately one year later, after full discovery, the trial court granted the newspaper's motion to reconsider the federal question. (App. 49-54). In a memorandum opinion that fully explored the "public figure" issue, the court stated that "under *Gertz* we must first identify the public controversy and then examine the plaintiff's conduct regarding the controversy." (App. 50).

The trial court corrected its prior ruling in several important ways. It ruled that there need not have been a pre-existing recruiting controversy at Pittsburgh for Warford to be deemed a "public figure." Instead, it found the national controversy over recruiting sufficient:

> It is undisputed by the plaintiff that a general public controversy existed concerning the proper recruitment of athletes in college sports. This public controversy is a real dispute, the outcome of which not only affects the general public but more obviously colleges in general

> and more specifically universities heavily involved in sports.
>
> As a school belonging to the prestigious Big East Conference and a member of Division I of the National Collegiate Athletic Association (NCAA), the University of Pittsburgh is an example of a university heavily involved in sports and consequently involved in the highly competitive recruiting of high school athletes. With such status, therefore, we find that the public controversy requirement of *Gertz* is met by the existence of the nationwide controversy regarding the recruitment of college athletes.

(App. 51).

With respect to Warford's conduct in the controversy, the trial court found that:

> As the record now reflects the plaintiff was an assistant coach heavily involved in recruiting. The plaintiff has stated that his reputation as a recruiter attracted the headcoach at Pittsburgh to offer him a job as an assistant coach. Recruiting is listed as one of the plaintiff's primary duties on his resume when trying to attract prospective employers. As an assistant coach at a major university such as the University of Pittsburgh, he had more than a trivial or tangential role in the ongoing controversy surrounding college athletics. One of the most important considerations in making this determination is the fact that it can now be determined from the existing record that the plaintiff was heavily involved in recruiting and was directly responsible for recruiting numerous highly sought high school players. The plaintiff has testified as to the many players which he is responsible for recruiting to play at the University of Pittsburgh. . . .

(App. 51-52).

The trial court further ruled that Warford enjoyed unusual access to the news media:

> We believe that a person who is an assistant coach in a major college program closely covered by the sports media may readily avail himself of the media. This is especially true for an assistant coach who has obtained the status of the plaintiff as a recruiter of major players. It is obvious to us that the plaintiff would have been one of the first persons to be interviewed by the news media about any controversy involving recruiting at the University of Pittsburgh. Additionally, the Pittsburgh news media would logically have sought out the plaintiff for his comments for any local news articles regarding the national recruiting controversy.

(App. 52-53).

Finally, the trial court agreed with this Court's statement in *Gertz*, that "a compelling normative consideration underlying the distinction between public and private defamation plaintiffs" is that the former have assumed certain risks of public commentary by the vocations they have assumed in society. *Id.* The trial court found:

> Through his position and recruiting activities the plaintiff has voluntarily injected himself into the public controversy surrounding the recruiting of college athletes, and he has assumed the risk that negligent defamatory remarks will be made about him. While the position of assistant coach alone does not make the plaintiff a limited public figure, his position along with his conduct as a major recruiter at the University of Pittsburgh, a school in the Big East Conference and a Division I member of the NCAA, does thrust the plaintiff into the public controversy surrounding college athletics. . . .

(App. 53).

At the close of Warford's case, the trial court granted a motion for a directed verdict judgment against Warford

and in favor of petitioners on the ground that no "actual malice" had been shown. (App. 41).

E. The Proceedings In The Supreme Court Of Kentucky

On April 26, 1990, the Supreme Court of Kentucky reversed the directed verdict judgment and remanded the case for retrial. In so doing it issued a final decision on the federal "public figure" issue, ruling Warford to be a "private figure." The basis for the court's ruling was two-fold.

First, the court held the absence of a preexisting local controversy at Pittsburgh, where Warford resided and coached when the articles were published, was fatal to the public figure defense:

> At Pittsburgh, there was no particular or ongoing controversy with which to link the general recruitment issue or controversy; thus, we cannot conclude that appellant was involved in a particular and identifiable public controversy. The Fayette Circuit Court was unable to determine that a specific controversy existed at Pittsburgh prior to appellees' publication. And there was no particular finding of a local controversy over recruiting at Pittsburgh when the defamatory statements were published.
>
> Accordingly, we hold that the public controversy requirement of the *Gertz* test has not been met.

(App. 25).

Second, the court rejected the newspaper's "claim that it is irrelevant that appellant never publicly spoke out on recruiting issues. . . . " The court found that the defendants' contention "that the significant question in this case has always hinged on appellant's acceptance of the risk of closer scrutiny" would "ignore the way in which the United States Supreme Court has itself applied

the *Gertz* test. . . . " (App. 25-28). The Kentucky Supreme Court ruled:

> If *Gertz* did not thrust himself into the vortex of controversy by assuming the representation of a controversial plaintiff in the narrowly drawn controversy surrounding the civil and criminal liability of police officers who shoot citizens, it is inconsistent to characterize an assistant basketball coach's recruiting activities at the University of Pittsburgh as the means by which he thrust himself into the public concern surrounding recruiting. . . .

(App. 28). The court concluded "that Warford did not assume the risk of defamation to the extent or in the manner contemplated by the Supreme Court in *Gertz* and its progeny" because he did not "speak out" on any recruiting controversy at Pittsburgh with an attempt to resolve it in a particular way. (App. 26-29). The Kentucky Supreme Court also ruled that Warford's access to the press "did not rise to the level of the regular and continuing access enjoyed by public figures." (App. 29).[2]

Finally, the Supreme Court of Kentucky ruled that evidence admitted at trial which corroborated the truth of Miller's allegations should be excluded at the retrial. Two Pittsburgh recruiting aides living in Lexington, Irwin

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[2] The Supreme Court of Kentucky additionally ruled there was sufficient evidence of "actual malice" for the issue to have gone to the jury, citing "minimal efforts" to verify Steve Miller's credibility, the gravity of Miller's charge, the inclusion of the allegation in outlines of the draft article prior to the confrontation interview with Warford, and the newspaper's "damaging construction" of Miller's "ambiguous statements." (App. 30-35). These facts, the court said, were sufficient to allow a jury to find "actual malice," which this Court has defined as the publisher's "high degree of awareness of probable falsity." *St. Amant v. Thompson*, 390 U.S. 727 (1968).

Stewart and Patti Eyster, assisted Warford in his plan to recruit Miller. As part of the recruiting effort, Warford was alleged to have "arranged an after-school job with Eyster for Miller through which to funnel improper gifts of money from Pittsburgh alumni." (App. 35-36). At trial, Warford admitted he arranged the job. (R.O.A. II Warford Tr. 38, 68-71). The Kentucky Supreme Court ruled this evidence inadmissible because Warford "was accused of the specific act of offering Miller money, as opposed to the general charge of having a corrupt disposition. Therefore, the truth of the accusation could not be proven by other specific bad acts." (App. 36). The court rejected the argument that this was not an "other act" at all, but rather direct evidence of the plan to recruit Warford in violation of NCAA rules prohibiting the payment of money. The court concluded:

> To the extent that the Eyster and Stewart evidence was relevant to the jury's understanding of the reasonableness of Miller's belief that appellant offered him money, the probative value of this evidence was far outweighed by its potential for prejudice. . . .

(App. 38).[3] These are the holdings of the Supreme Court of Kentucky which petitioners ask this Court to review.

REASONS FOR GRANTING THE WRIT

Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court has engaged in a "continuing effort to

[3] This issue was originally raised by Warford in a motion *in limine* denied by the trial court. The federal question relating to its exclusion was raised by defendants in their Petition for Rehearing, at 10, in the Supreme Court of Kentucky.

define the proper accommodation between" two fundamental but "competing concerns": our nation's "need for a vigorous and uninhibited press" on one hand, and, on the other, "the legitimate interest in redressing wrongful injury" to the individual's "own good name." *Gertz v. Robert Welch, Inc.*, 418 U.S 323, 341-42 (1974). The conceptual vehicle for this constitutional accommodation has been the "public official/figure rule" developed by *Sullivan* and its progeny, particularly *Gertz*.

The lower courts have experienced considerable difficulty in adjudicating the "public figure" issue. As the Court of Appeals for the Third Circuit observed:

> Without a precise diagram for guidance, courts and commentators have had considerable difficulty in determining the proper scope of the public figure doctrine. One district court opined that the task of demarcating between public and private figures "is much like trying to nail a jelly fish to the wall."

Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1082 (3rd Cir.), *cert. denied*, 474 U.S. 864 (1985), *quoting Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) (footnote omitted). Many other lower courts have expressed similar confusion. *See, e.g., Clark v. American Broadcasting Cos.*, 684 F.2d 1208, 1218 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983).

Although the lower courts are not in agreement regarding the elements or the application of a "public figure" test, they have generally adopted an approach which at least inquires as to (i) whether the alleged defamation involves a public controversy, and (ii) how the plaintiff is involved in that controversy. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *Clark v. American Broadcasting Co., supra*. In the case at bar, the Supreme Court of

Kentucky construed both issues in the narrowest of terms. The court ruled that despite any role Warford had in the national public controversy regarding recruitment of college athletes, he could not be a "public figure" since there was no preexisting local recruiting controversy at Pittsburgh, where Warford coached and resided. With respect to Warford's involvement in the controversy, the Kentucky court ruled that, despite his actions and his high-profile, voluntarily assumed position as an important basketball recruiter, Warford could not be deemed a "public figure" because he did not "speak out" in an attempt to resolve a recruiting controversy. These dual rulings unduly restrict the protection afforded the press by the "public figure" defense.

I. The Supreme Court Of Kentucky's Construction Of The "Public Figure" Qualified Constitutional Libel Defense Incorrectly Answers Important And Unresolved Federal Questions Concerning Freedom Of The Press Which Have Been Answered In Conflicting Ways By Other Lower Courts

This Court in *Gertz* rejected a case-by-case approach to adjudicating claims involving this most basic accommodation between speech and reputation because it "would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable." *Gertz*, 418 U.S. at 343. The Court therefore reasoned that since "an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application." *Id.* at 343-44. The Court warned, however, that rules "necessarily treat alike various cases involving differences as well as similarities" and therefore "not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority." *Id.* It is this cautionary language

which has been ignored by those lower courts which have misconstrued *Gertz* in the same way the Kentucky Supreme Court misinterpreted its text.

In *Gertz*, the Court first noted that public officials and public figures "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* But the Court quickly added that

> More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . . .
>
> Those classed as public figures stand in a similar position. . . .

Id. at 344-45. Thus, *Gertz* made it clear that the primary analogy between "public officials" and "public figures" is that both assume the risk of adverse public commentary by their actions and positions in society.

The *Gertz* Court proceeded to amplify:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. *More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence*

> *the resolution of the issues involved.* In either event, they invite attention and comment.

Id. at 345 (emphasis added). It is the emphasized language which the Supreme Court of Kentucky and other lower courts have taken out of context to limit and restrict *Gertz* in fundamental ways that are incompatible with the intended larger meaning of *Gertz*. The *Gertz* text itself immediately follows the preceding italicized language with a reaffirmation of its broader holding:

> Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.

Id. at 345. The two most basic interpretive errors of the Supreme Court of Kentucky may be simply stated and are themselves duplicated or repudiated in a legion of lower court decisions throughout the country.

A. The Supreme Court Of Kentucky Mistakenly Held That A Libel Plaintiff Must Be Deemed A "Private Figure" With Respect To A News Report Addressing His Involvement In A National Public Controversy Unless He Also Is Involved In A Relevant Preexisting Local Controversy In The Community Where He Resides

First, the Kentucky Supreme Court held there must be a preexisting local controversy in the community where the plaintiff resides for the "public figure" defense to apply. Thus, in the case at bar a reprint of news articles published by a Kentucky newspaper to a national academic audience about a national problem, which included an allegation about efforts made in Kentucky by the former captain of the Kentucky basketball team to improperly recruit Kentucky's most celebrated high

school basketball player, was not given protection by the "public figure" defense because the articles originally appeared when there was no recruiting controversy at Pittsburgh. There is nothing in *Gertz* or subsequent Supreme Court precedent to support this result.

Numerous courts have found that an article which addresses a national controversy is sufficient to meet the "public controversy" requirement of *Gertz*. *Marcone*, 754 F.2d at 1083 (national controversy over drug trafficking); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 137-8 (2d Cir. 1984) (nudity); *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (en banc), *cert. denied*, 484 U.S. 870 (1987) (international oil industry controversy).

Several courts have also explicitly ruled that the "preexistence" of a controversy should not depend on whether media in a particular locale have already addressed the public issue. *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 434 (5th Cir. 1987); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562 (Ariz. 1986); *Tavoulareas*, 817 F.2d at 755 n. 13. These courts distinguish between articles which "reveal" controversy and those which "create" one. As the Fifth Circuit stated:

> Trotter dismisses much of the press coverage as irrelevant because it was published after Anderson's articles. Citing *Hutchinson v. Proxmire*, Trotter observes that Anderson cannot invoke the public-figure defense if the allegedly defamatory articles themselves turned him into a public figure. Creating a public issue, however, is not the same as revealing one. The purpose of investigative reporting is to uncover matters of public concern previously hidden from the public view. We agree with the District of Columbia Circuit that the first newspaper to report on a pre-existing public dispute should not be held to a stricter standard of liability than those who follow. To hold otherwise would

> undermine the purpose of the public-figure doctrine – encouraging debate on issues of public concern. Anderson's articles did not cause the later press coverage of the labor violence; the labor violence itself did.

Trotter, 818 F.2d at 434 (footnote omitted). The NCAA Reprint revealed how Warford was involved in the national recruiting controversy.

Other lower courts disagree with these cases and concur with the Kentucky Supreme Court that the controversy must preexist in the plaintiff's locale. In *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681 (4th Cir. 1989), the court insisted on a local preexisting controversy in rejecting the "public figure" defense. Similarly, in *Gannett Co. v. Re.*, 496 A.2d 553 (Del. 1985), the "energy crisis" was rejected as an insufficiently specific controversy to justify application of the "public figure" defense. There are other similar cases. *See, e.g., Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981).

The position taken by the Kentucky Supreme Court is mistaken. The purpose of the *Sullivan/Gertz* precedents is to protect our "national conversation" concerning issues of public concern while accommodating the interest in personal reputation. A rule requiring a preexisting local controversy in the community where the plaintiff resides fails to protect national discussion and also discriminates against agenda-setting speech in a particular locale. Whether Pittsburgh has already begun debating NCAA recruiting violations should have no bearing on the protection afforded a Kentucky newspaper's discussion of this national problem, particularly where the discussion concerns recruiting activities occurring in Kentucky and involving well-known Kentuckians. Allowing manipulation of the specificity, locale, or timing of the "public controversy" element of the "public figure" defense

invites censorship and a "chill" on the freedom of the press to report national controversies.

The Kentucky Supreme Court's approach is wrong because it asks the wrong questions. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), there was no inquiry into whether a controversy already existed regarding the "fixing" of football games at the University of Georgia and the University of Alabama. The issue was whether the expression in question addressed important national public controversies. Similarly, this Court in *Sullivan* did not ask whether there was a preexisting civil rights controversy in Montgomery, Alabama. The point of *Sullivan* was that our national debate on civil rights could not be muffled even if people in places like Montgomery in 1960 did not want the issues discussed.

B. The Supreme Court Of Kentucky Mistakenly Ruled That A Libel Plaintiff, Who By His Conduct And Position Has Assumed The Risk Of Public Scrutiny In Regard To A National Public Controversy, Must Nevertheless Be Deemed A "Private Figure" If He Has Not "Spoken Out" To Influence The Resolution Of A Relevant Preexisting Local Controversy

The second fundamental error of the Supreme Court of Kentucky is its holding that a plaintiff must "speak out" on the public controversy in an effort to influence its resolution in order to be regarded a "public figure" under *Gertz*. Once again, this holding is the subject of many conflicting opinions in the lower courts. For example, in *Clyburn v. News World Communications, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990), the court found the plaintiff to be a "limited purpose public figure" even though he had not "spoken out" on any preexisting controversy, but because his "acts *before* any controversy arose put him at its center." (emphasis added). In *Marcone*, 754 F.2d at

1084-87, the court held the plaintiff's "course of conduct" caused him to be a "limited purpose public figure" even though he did not speak out on any public controversy and probably did not wish to attract any attention. The court noted that while in typical "public figure" cases the plaintiff may speak out on a public issue:

> In other defamation cases, the plaintiff's action may itself invite comment and attention, and even though he does not directly try or even want to attract the public's attention, he is deemed to have assumed the risk of such attention. . . .
>
> Somewhat related, courts have classified some people as limited purpose public figures because of their status, position or associations. For example, sports figures are generally considered public figures because of their position as athletes or coaches. *See, e.g., Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (en banc); *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1113 (N.D.Cal. 1984). . . .
>
> . . . .
>
> In addition to sports figures, others have been classified as limited purpose public figure by virtue of their associations or positions. . . .

Id. at 1083-84 (citations omitted).

Similarly, in *Trotter*, 818 F.2d at 434-36, the Fifth Circuit Court of Appeals found the plaintiff to be a public figure "by virtue of his position" at a Coca-Cola bottling company in Guatemala City. And *McDowell v. Paiewonsky*, 769 F.2d 942, 947-951 (3rd Cir. 1985), held an architect engineer who regularly worked on public projects to be a "limited purpose public figure" even though he did not "speak out" on a public issue because he "voluntarily assumed a position that invited attention." *Id.* at 950. There are many other cases which so interpret *Gertz*. *See, e.g., Dameron v. Washington Magazine*, 779 F.2d 736 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986) (air traffic

controller at time of major airline disaster is public figure); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977) (debt collection agency was public figure because it voluntarily engaged in the challenged practices, and because publicity was key aspect of FTC enforcement); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976) (defense contractor holding "stag party" for defense and military personnel was public figure); *White v. Mobile Press Register, Inc.*, 514 So.2d 902 (Ala. 1987) (former EPA official who became an officer in a company transporting hazardous waste held a public figure).

Other lower courts have agreed with the Kentucky Supreme Court. For example, the court in *Bagley v. Iowa Beef Processors, Inc.*, 797 F.2d 632, 644-47 (8th Cir. 1986) (en banc), held the plaintiff corporate executive to be a "private figure" because he did not "speak out" on the public controversy of which he was at the center. The court in *Long v. Cooper*, 848 F.2d 1202, 1206 (11th Cir. 1988), found the plaintiffs to be "private figures," holding "their prominent position in the industry, standing alone, does not create a sufficient nexus between Long and Long's Electronic and the purported controversy." *See also Wheeler v. Green*, 593 P.2d 777 (Or. 1979).

The view adopted by the Supreme Court of Kentucky is wrong for several fundamental reasons. First, the analogy from "public official" to "public figure" is not based on the speech activities of either. Public officials are subject to heightened public scrutiny because of the positions they hold, the powers they wield, the decisions they make, and the conduct in which they engage. They are not subject to public scrutiny because of their willingness to discuss their duties with the press. The same is true for public figures. It is not their willingness to converse about their conduct or position in a public controversy

that subjects them to public comment; it is the fact they knowingly assume positions or engage in conduct that would reasonably attract public attention.

It is evident the decisions of this Court have recognized this point. *Sullivan* did not inquire into whether the Alabama police officials made speeches about the civil rights demonstrations. In *Butts*, the question was not whether the coach spoke about fixing games; instead the Court held he "may have attained" public figure status "by position alone," 388 U.S. at 155, because he had the "responsibility of managing the athletic affairs of a state university." 388 U.S. at 146.

Second, the normative basis for *Gertz* is the public figure's assumption of risk, but there is no principled basis for limiting the form this assumption of risk may take to that of speaking out on a public controversy. Sirhan Sirhan is a "public figure" because he assassinated Robert F. Kennedy, not because he "spoke out" against Senator Kennedy's presidential candidacy. It was his heinous act, not any speech he gave, which was the "compelling normative distinction" that transformed him from a "private" into a "public figure."

Indeed, a rule by this Court limiting "public figures" to persons who "speak out" could create a legal incentive for all powerful figures to decline to explain their conduct to the public. Conversely, it would act to rob the press of the "breathing space" for error concerning the actions of the powerful, and thereby "chill" such expression. Moreover, it would reduce the stock of speech concerning legitimate controversies and, over time, increase the likelihood of error in press reports, and the frequency of libel suits.

Warford chose to recruit Miller precisely because Miller was the most celebrated high school basketball player in the most notoriously "basketball-crazy" state in the

country. Recruiting Miller would have been a "feather in Warford's hat" because it would have enhanced the national reputation of Pittsburgh's basketball program, and continued to build for Warford a reputation as a recruiter of national significance. Warford needed and sought this public recognition of his recruiting ability in order to attain a head coaching position at a major school. He deliberately engaged in the very activities that are the subject of an indisputable national controversy because he needed and desired the added celebrity which success in recruiting Miller could have brought him.

Thus, Warford stands in stark contrast to the plaintiffs in *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). In *Hutchinson*, the plaintiff was an obscure scientist who involuntarily became the subject of a public controversy when he was awarded Senator Proxmire's "Golden Fleece" award. The plaintiff in *Wolston* similarly did not voluntarily engage in activity intended to call public attention to himself. On the contrary, he resisted a subpoena to give testimony to a grand jury investigating Soviet espionage activities. The Court noted, in a telling passage, "this is not a case where a defendant invites a citation for contempt in order to use the contempt citation as a fulcrum to create public discussion about the methods being used in connection with an investigation or prosecution." 443 U.S. at 168. In contrast, Reggie Warford recruited Steve Miller precisely because he wanted his recruiting activities to be noticed and discussed. His career depended on it. He was just unhappy about the nature of the attention his actions received.

II. The Ruling Of The Supreme Court Of Kentucky Regarding The Exclusion Of Evidence Corroborating The Truth Of The News Reports Sued Upon Eviscerates This Court's Holding That There Can Be No Liability In Libel For The Publication Of Truthful Statements

In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), this Court adopted another rule defining "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Id.* at 768, *quoting Gertz*, 418 U.S. at 325. The rule announced was that "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements are false." *Id.* 768-69. The Court in *Hepps* strictly limited its ruling to the holding announced, explicitly reserving other questions with respect to the falsity standard. 475 U.S. at 779 n.4. The decision of the Kentucky Supreme Court presents a question not addressed in *Hepps*; namely, whether courts may constitutionally construe common law evidentiary rules in libel cases to exclude from evidence facts which would corroborate the truth of the allegation published by the newspaper.

Steve Miller testified, and in large measure Reggie Warford admitted, that as part of the recruiting effort, Warford arranged a part-time job for Miller in violation of NCAA rules. This evidence corroborated the newspaper's defense that Warford, Eyster, and Stewart were involved in a scheme to recruit Warford in violation of NCAA rules. The trial court admitted the evidence, but the Kentucky Supreme Court excluded it for retrial through an application of the common law "other acts" doctrine. The court ruled it to be an "other act," despite the citation of ample Kentucky law to the contrary and despite the fact this "other act" involved the same recruit, recruiter,

recruiting inducement, and time frame as the "act" itself. Because this evidence was so corroborative of the article's truth, the Kentucky Supreme Court excluded it as too "prejudicial." This Court should review this ruling.

III. This Court Should Grant The Petition Now To Prevent The Further Erosion Of First Amendment Values

This Court should grant jurisdiction at this time because "it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n. 6. (1974). The press in Kentucky and throughout the country do not know whether news reports addressing national controversies will be protected from libel suits if, and only if, each allegation or illustration in the report relates to a person residing in an area where the same controversy has already occurred on a local level. The press does not know whether it may have "breathing space" as to an allegation only if the target has already "spoken out" on the controversy. The press does not know whether a court may eviscerate the falsity requirement of *Hepps* by straining common law rules to exclude evidence corroborating the truth of news reports.

If this Court accepts jurisdiction and reinstates the directed verdict judgment on the federal question, this case is over. But if the Court does not accept jurisdiction, this suit may well be resolved without any opportunity to reverse the decision of the Supreme Court of Kentucky with regard to these important federal questions. The precedent would then continue to erode the free speech

rights the First Amendment guarantees the press. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to the Supreme Court of Kentucky should be granted.

Respectfully submitted,

RICHARD J. OVELMEN
(Counsel of Record)
LANDON K. CLAYMAN
BAKER & MCKENZIE
Suite 1600, Barnett Tower
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 789-8900

EDWARD O. DELANEY
KENNETH H. INSKEEP
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204

ROBERT F. HOULIHAN, JR.
JAMES L. THOMERSON
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507

Attorneys for Petitioners

APPENDIX

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RENDERED: April 26, 1990
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

89-SC-181-TG

APPEAL FROM FAYETTE CIRCUIT COURT
NO. 86-CI-4251

REGGIE WARFORD

APPELLANT

V.

THE LEXINGTON HERALD-LEADER COMPANY;
and JOHN S. CARROLL, Individually

APPELLEES

OPINION OF THE COURT BY JUSTICE LAMBERT

REVERSING

Appellant Reggie Warford sued the Lexington Herald-Leader Company and editor John S. Carroll for defamation in the Fayette Circuit Court in 1986. The allegedly false statements of which appellant complained concerned published allegations of recruiting improprieties he committed in his capacity as assistant basketball coach at the University of Pittsburgh. The statements at issue originally appeared in the *Lexington Herald-Leader* in the fall of 1985, but were reprinted in 1986 in a special publication under the heading "NCAA Reprint" which was entitled *1985: A Year of Crisis in College Athletics*. The Reprint is the source of the libel alleged to be actionable.

After two years of discovery and pretrial hearings, this case was tried in early 1989. At the conclusion of appellant's case in chief, the trial court directed a verdict

for appellees. Appellant filed a notice of appeal and we granted his motion for transfer.

Appellant was a student basketball player and team captain at the University of Kentucky. Following his graduation from UK, he became an assistant basketball coach at Iowa State University. Among other duties, appellant recruited players. In 1980, appellant was hired as an assistant coach at the University of Pittsburgh by Coach Roy Chipman. Chipman testified that appellant was hired in part for his recruiting ability, as well as for his knowledge of the game. While appellant was not the chief recruiter, he was expected to produce commitments from talented high school players, as were the head coach and other assistant coaches. Chipman nearly fired appellant in 1983 because he was somewhat disorganized and ineffective in his recruiting efforts, but gave him another chance for the upcoming year.

One of appellant's prospects in 1984 was an outstanding Kentucky basketball player named Steve Miller. Miller was interviewed in 1985 by a reporter from the *Lexington Herald-Leader* about his career and the experience of being recruited for college basketball. Miller stated that appellant attempted to secure his commitment to play basketball at Pittsburgh by offering to share the benefits of the raise appellant anticipated if Miller signed. The *Herald-Leader* published the following in one of a series of articles about the "crisis in college athletics."

> "Steve Miller, a heavily recruited forward from Lexington's Henry Clay High School, said that assistant Coach Reggie Warford of the University of Pittsburgh offered to split some money with him.

> Warford "said that if he signed the top player out of Kentucky that he would have a raise and that I would benefit from that raise also," Miller said.
>
> Warford, a former University of Kentucky player, acknowledged that he told Miller that signing him "would be a recruiting feather in my hat." But he denied offering Miller any money.
>
> Miller went to Western Kentucky University instead."

Although appellant's denial of the allegations was printed in the October, 1985 story, Miller's prompt retraction of his statement was not disclosed when the story appeared in the Reprint.

The January, 1986 Reprint contained the 1985 news stories, editorials and other columns, as well as a nationwide chronology of events related to violations of NCAA rules. It also include the following summary.

> "Steve Miller, now at Western Kentucky, told the newspaper that Pitt assistant coach Reggie Warford offered him money."

The Reprint was sent to the president, athletic director, faculty representative, and head football and basketball coaches at each member university, as well as 100 major newspapers across the country.

Based upon the Reprint, in the latter part of 1986, appellant sued for defamation. The statute of limitations had run on any claim he may have had based on the original article. During discovery, appellant filed a Motion for Partial Summary Judgment and requested a determination as to whether he enjoyed the status of a

private, as opposed to a public figure for First Amendment purposes. Appellees had raised a defense to the complaint that appellant was a public figure and would be required to prove "actual malice" by the newspaper in publishing the story, rather than negligence. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

The trial court found "from the record, existing at the time of submission, that the plaintiff is not a public figure." Based on the definition of public figures set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the trial court considered appellant's role in the public controversy concerning recruiting violations in college athletics and it found that appellant occupied a minor role in recruiting at Pittsburgh. Moreover, it found that there was no recruiting controversy at Pittsburgh when appellant was hired. Finally, the court determined that appellant neither thrust himself into other controversies nor tried to influence controversies that arose during his tenure.

The Court entered its opinion on this issue in January, 1988. Discovery proceeded toward the January, 1989, trial date. Late in November, 1988, appellees moved the trial court to reconsider its previous ruling on the public versus private figure question. Upon a more fully developed record, and trial court reversed its earlier ruling.

Although the trial court still relied upon *Gertz, supra*, it appears to have reinterpreted the public controversy requirement of the *Gertz* test for determining who is a public figure. On reconsideration, the court rejected the motion that the absence of a specific public controversy at

Pittsburgh precluded a finding that appellant was a public figure. Instead it found that in light of Pittsburgh's Division I status in the NCAA, "the public controversy requirement of Gertz is met by the existence of the nationwide controversy regarding the recruitment of college athletes."

As to the appellant's involvement in the controversy, the trial court found his reputation as a recruiter at a major Big East Conference school significant. "Through his position and recruiting activities the plaintiff has voluntarily injected himself into the public controversy surrounding the recruiting of college athletes." Thus, shortly before trial, appellant was found to be a public figure for the limited purpose of comment on his recruiting activities.

At the conclusion of appellant's case in chief, the trial court directed a verdict on the grounds that insufficient evidence of actual malice had been presented to permit submission of the case to the jury. This appeal followed.

Three issues are before the court on this appeal and are as follows:

1) Did the trial court err in holding that appellant is a public figure for the limited purpose of comment on his actions as a college basketball recruiter?

2) Did the trial court err in ruling that appellant failed to present sufficient evidence of actual malice to support a jury verdict?

3) Did the trial court improperly admit evidence of acts unrelated to the defamatory publication?

I. PUBLIC V. PRIVATE FIGURE

Appellant contends that he cannot be deemed a public figure under the standards adopted by the United States Supreme Court in the line of cases beginning with *Gertz v. Robert Welch, Inc.* Not surprisingly, appellees defend the trial court's interpretation of *Gertz* and other cases. This issue cannot be meaningfully addressed without a review of the relevant decisions of the United States Supreme Court. At the outset we note that the decision as to whether a plaintiff is a public figure is a question of law. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, *cert. denied*, 449 U.S. 898 (1980); *see Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966).[1]

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court recognized constitutional protection for speech and press in libel actions brought by public officials. It held that the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment:

> "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* 376 U.S. at 279-80.

---

[1] We do not decide whether the trial court acted properly in deciding the question of law without submitting the evidence to the jury for findings of fact. *See Yancy v. Hamilton*, Ky., ___ S.W.2d ___ (1990).

The Court stated explicitly the rationale underlying its decision in the following often-quoted passage:

> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, . . . " *Id.* 376 U.S. at 270.

Three years after *New York Times v. Sullivan*, the Court extended the actual malice standard beyond public officials to include public figures. *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). Wallace Butts (*Curtis Publishing Co. v. Butts, supra*) was the athletic director at the University of Georgia at the time the *Saturday Evening Post*, owned by the Curtis Publishing Co., published an article accusing Butts of conspiring to "fix" a 1962 football game between Georgia and the University of Alabama. He was formerly Georgia's football coach, was well-known among coaches, and was negotiating for a position with a professional team when the allegations were published. In the companion case, Edwin Walker (*Associated Press v. Walker, supra*) was an outspoken opponent of federal intervention by physical force in school desegregation actions and was alleged in a published report to have encouraged violence among rioters protesting James Meredith's court-ordered enrollment at the University of Mississippi in 1962.

The plurality opinion turned to ordinary tort principles to determine the plaintiffs' status as public figures. Finding that "both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications," *id.*, 388 U.S. at 154, the plurality held

that Butts had the status of public figure by position alone, while Walker by purposeful activity had thrust his personality into the vortex of an important public controversy. *Id.*, 388 U.S. at 155. The opinion also noted that both had "sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements." *Id.* (reference omitted).

A short while later, in *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), a plurality of the Court further extended the actual malice standard by holding that it applies to publications about private individuals who become involved in events of public interest.

In an apparent retreat from the broad event-oriented position taken in *Rosenbloom* and in an effort to achieve a consensus, the United States Supreme Court decided *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the decision which forms the foundation of our analysis of the issue now before this Court.

In *Gertz*, a prominent Chicago lawyer had agreed to represent the family of a murder victim in civil litigation against the police officer who killed the youth. In a John Birch Society publication, attorney Gertz was subsequently branded a criminal, a Communist and a co-conspirator in a campaign to discredit local law enforcement agencies. A defamation action followed and the trial court found in favor of the defendant. The Court of Appeals for the Seventh Circuit affirmed based on its reading of *Rosenbloom*, which it held to require application of the *New York Times* standard whenever the publication concerned an issue of significant public interest,

regardless of the position or notoriety of the plaintiff. On review, the Supreme Court recognized its inability to reach agreement on why the *New York Times* privilege applied in *Rosenbloom*, and further commented that the five separate opinions in *Rosenbloom* "reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment." *Gertz*, 418 U.S. at 333. The Court commented,

> "Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury [by defamatory falsehood]." *Id.*, 418 U.S. at 342.

Nevertheless, the Court rejected an *ad hoc* resolution of competing interests in each particular case and set out broad rules of general application for use by lower courts to obtain more predictable results.

As a threshold distinction, the Court focused on types of defamation plaintiffs, as opposed to just the subject matter of the defamatory statement, which was held determinative in *Rosenbloom*. Recognizing that private individuals enjoy less access to the media than do public officials and public figures and are therefore less capable of redressing reputational injury by rebuttal in the press, the Court found a substantial state interest in protecting private persons. *Id.*, 418 U.S. at 344. The Court said,

> "We hold that, so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.*, 418 U.S. at 347.

In response, we held in *McCall v. Courier-Journal & Louisville Times Co., Ky.*, 623 S.W.2d 882, 886 (1981), *cert. denied*, 456 U.S. 975 (1982), that simple negligence was the standard of liability necessary to "adequately [protect] the private individual from defamation." However, to recover punitive damages, the law requires even a private individual to show actual malice. *Gertz*, 418 U.S. at 349. "Punitive damages may be recovered only if the plaintiff shall allege and prove publication with legal malice . . . ." KRS 411.051.

The Court in *Gertz* also noted a key distinction between public and private plaintiffs.

> "More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." *Id.*, 418 U.S. at 344.

Public figures as well as public officials assume the risk of closer public scrutiny. *Id.* at 345.

Public figures were identified in two principal subcategories. The Court said,

> "Hypotheticaly, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy

> positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Gertz.*, 418 U.S. at 345.

By its public figure classification, the Court spawned a substantial body of caselaw. *See generally,* Annotation, "Libel and Slander: Who is a 'Public Figure' in the Light of *Gertz v. Robert Welch, Inc.,*" 75 ALR 3rd 616 (1977, and 1989 supp.); *Restatement (Second) of Torts,* § 580A reporter's notes (1977, 1987, 1989 supp.).

The Court further recognized that public figures may exist who are not easily classified as either general purpose public figures or limited purpose public figures.

> "Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an 'influential role in ordering society.' " *Gertz,* 418 U.S. at 345. (reference omitted.)

Nevertheless, upon analyzing Gertz's status as a public figure, the Court returned to its two-part classification.

> *"That designation* [public figure] *may rest on either of two alternative bases:* In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. *More commonly, an*

> *individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.* In either case such persons assume special prominence in the resolution of public questions." *Id.*, 418 U.S. at 351.

After its exhaustive analysis and despite Gertz's extensive professional and community activities and his several published books and articles, the Court did not determine that he was a general purpose public figure.

> "We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.*, 418 U.S. at 352.

To determine whether Gertz was a limited purpose public figure, the Court considered his minimal role at the coroner's inquest and his lack of involvement in the criminal prosecution of the police officer.

> "Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.*

From the foregoing, the Court concluded that Gertz was not a public figure for First Amendment purposes.

We have engaged in a lengthy recitation of the law applied in *Gertz* not only because it is the seminal case controlling the *standards* we must apply to determine whether appellant was a public figure for any purpose, but also because the *method* for analysis guides us as it guided the United States Supreme Court in three subsequent decisions, to be discussed *infra*, relevant to our inquiry here.

There is no contention that appellant is a public figure for all purposes. If he is to be considered a public figure for a limited purpose under *Gertz*, we must decide, as a matter of law, whether in the broadest sense appellant thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues. The factors to be considered in making this determination, including appellant's access to the media, have been developed and refined in subsequent decisions from this nation's highest court. We now undertake a review of these decisions.

In *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), the Court studied the public controversy requirement. Asked to apply the *New York Times* standard of recovery in a libel suit by a socialite against the publisher of *Time* magazine, the Court declined.

The publisher had argued that Mrs. Firestone was a public figure because her divorce was a "cause *ce'le'bre*," and thus a public controversy. The Court rejected this argument relying on its definition of public figure as established in *Gertz v. Robert Welch, Inc., supra*, as follows:

> "respondent did not assume any role of especial prominence in the affairs of society, . . . and she

> did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." *Firestone*, 424 U.S. at 453.

Moreover and significantly, the Court refused to reinstate the *Rosenbloom* doctrine by extending the *New York Times* privilege to statements about any controversy of a general public interest. A public controversy cannot be equated "with all controversies of interest to the public." *Id.*, 424 U.S. at 454.

The last two Supreme Court decisions to be revisited were rendered on the same day. In *Wolston v. Readers' Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979), the plaintiff sued the publisher of a book on Soviet spies in which Wolston was listed as a Soviet agent. Although he had never been indicted for espionage, his aunt and uncle were convicted on such charges. Wolston was the subject of a flurry of newspaper articles concerning his failure to appear, despite being subpoenaed to do so, before a special grand jury impanelled to investigate Soviet intelligence agents. He did eventually appear and pled guilty to a contempt charge.

Reversing the court below, which had determined the plaintiff to be a public figure who failed to prove actual malice on the part of the publisher, the Court again relied on its decision in *Gertz*. The rationale for extending the *New York Times* rule to public figures, it explained, was two-fold. First, public figures enjoy greater access to the media, and are thus better able to redress injury from defamatory statements through self-help by rebuttal.

> "Second, and more importantly, was a normative consideration that public figures are less

> deserving of protection than private persons because *public figures*, like public officials, *have 'voluntarily exposed themselves to increased risk of injury from defamatory* falsehoods concerning them.' " *Wolston*, 443 U.S. at 164 (reference omitted, emphasis added).

The two subcategories of public figures, all purpose and limited purpose, were identified as the "two ways in which a person may become a public figure for purposes of the First Amendment." *Id.* Finding that Wolston did not qualify as a public figure for all purposes, the Court also rejected the lower court's findings that he had thrust himself to the forefront of a public controversy for a limited purpose by failing to comply with a subpoena ordering him to appear before a grand jury.

The Court's analysis proceeded according to its now settled pattern. Wolston had not voluntarily thrust himself into a public controversy. "It would be more accurate to say that petitioner was dragged unwillingly into the controversy." *Id.*, 443 U.S. at 166. Moreover, the Court assumed the existence of a public controversy only for the sake of argument.

> "It is difficult to determine with precision the 'public controversy' into which petitioner is alleged to have thrust himself. Certainly there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States, all responsible . . . citizens understandably were and are opposed to it." *Wolston*, 443 U.S. at 166 n. 8.

As to Wolston's voluntary actions, the Court did not find his failure to appear before the grand jury decisive. Considering the "nature and extent of [the] individual's participation in the particular controversy," the Court noted

that it had decided in *Gertz* that an attorney who voluntarily associated himself with a case certain to attract significant media attention was not a public figure. *Wolston*, 443 U.S. at 167. Similar to the facts in *Gertz*, Wolston never discussed the grand jury matter with the press, and he played only a minor role in any existent controversy over Soviet espionage investigation.

Further, the Court next rejected the mere newsworthiness of the plaintiff's failure to appear before the grand jury as conclusive of the public figure issue.

> "A private individual is not automatically transformed into a public figure just by becoming involved or associated with a matter that attracts public attention." *Id.*, 443 U.S. at 167.

Finally, Wolston did not engage "the attention of the public in an attempt to influence the resolution of the issues involved." *Id.*, 443 U.S. at 168. The Court observed that a person could precipitate a contempt citation in order to create public discussion of investigative methods, but concluded that such was not the case in *Wolston*. *Id.*

The final U.S. Supreme Court decision of critical importance herein is *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). Ronald Hutchinson was a behavioral scientist who succeeded in obtaining a National Science Foundation (NSF) research grant for studying objective measures of aggression in primates. In 1975, the NSF was awarded U.S. Senator William Proxmire's Golden Fleece Award for egregious wasteful spending for its funding of Hutchinson's research into "jaw-grinding and biting by angry or hard-drinking monkeys." Senator Proxmire's defamatory statements in the

Senate were published in newsletters sent to constituents. Hutchinson sued. The U.S. District Court found Hutchinson to be a public figure who had not met his burden of showing actual malice.

Reciting the litany of libel decisions beginning with *New York Times v. Sullivan*, the Court focused on the *Gertz* definition of a public figure for a limited purpose. The court below had held that Hutchinson was not a public figure because: 1) he had successfully applied for federal funds, and this fact had been reprinted in the local newspapers, and, 2) he had access to the media, as shown by the fact that his response to the Golden Fleece Award announcement was reported in some newspapers and wire services. The Supreme Court said:

> "Neither of those factors demonstrates that Hutchinson was a public figure *prior to the controversy* engendered by the Golden Fleece Award; his access, such as it was, came after the alleged libel." *Hutchinson*, 443 U.S. at 134-35, (emphasis added).

As to Hutchinson's status as a grant recipient, the Court observed that his public profile was not particularly outstanding and his published writings reached only a limited audience.

> "To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making a claimant a public figure." *Hutchinson*, 443 U.S. at 135.

Further, Hutchinson had not thrust himself or his views into a public controversy in order to influence

others, nor had he assumed a role of public prominence in the controversy. In fact, once again the Court was unable to grasp the nature of the particular controversy. The general public concern about public expenditures was not sufficiently particularized to have made Hutchinson a public figure. *Id.* The Court rejected a subject matter classification which would categorize all federal research grant recipients as public figures.

> "The 'use of subject matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.' " *Id.* at 135 (citing *Time v. Firestone,* 424 U.S. at 456).

Finally, Hutchinson's ability to respond to the Golden Fleece Award did not constitute "the regular and continuing access to the media that is one of the accoutrements of having become a public figure." *Id.,* 443 U.S. at 136.

Considering the *Gertz* factors and analysis as applied by the U.S. Supreme Court in its decisions culminating in *Hutchinson,* we will take the following approach to determining appellant's status as a public figure. We must first look to a point in time before the defamatory statements generated their own controversy and ask: (1) in what particular and identifiable public controversy (2) did appellant by some voluntary act involve himself to the extent that he either assumed a role of public prominence, or was in a position to influence others or the outcome of the controversy, and (3) did appellant enjoy

regular and continuing acqess to the media?[2] Despite applying this consistent set of criteria, the Supreme Court has weighted the significant factors differently in specific cases. We too shall comply with the *Gertz* admonition to look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.*, 418 U.S. at 352.

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[2] *See Clark v. American Broadcasting Cos., Inc.*, 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040.

> "First, a 'public controversy' must exist. Second, the nature and extent of the individual's participation in the particular controversy must be ascertained." *Id.* at 1218 (references omitted.)
>
> "The nature and extent of an individual's participation is determined by considering three factors: first, the extent to which participation in the controversy is voluntary; second, the extent to which there is access to channels of effective communication in order to counteract false statements; and third, the prominence of the role played in the public controversy." *Id.*

Compare *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (DC Cir.), *cert. denied*, 449 U.S. 898 (1980).

> "As the first step in its inquiry, the court must isolate the public controversy." *Id.* at 1296.
>
> "Once the court has defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiffs must have 'thrust themselves to the forefront' of the controversies so as to become factors in their ultimate resolution. They

(Continued on following page)

a. Public Controversy

The Fayette Circuit Court found the existence of

> " . . . *a general public controversy . . . concerning the proper recruitment of athletes in college sports.* This public controversy is a real dispute, the outcome of which not only affects the general public but more obviously colleges in general and more specifically universities heavily involved in sports.
>
> As a school belonging to the prestigious Big East Conference and a member of Division I of the National Collegiate Athletic Association (NCAA), the University of Pittsburgh is an example of a university heavily involved in

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> must have achieved 'a special prominence' in the debate. The plaintiff either must have been purposely trying to influence the outcome or could realistically have expected, because of this position in the controversy, to have an impact on its resolution." *Id.* (references omitted).
>
> "Finally, the alleged defamation must have been germaine to the plaintiff's participation in the controversy." *Id.* at 1298.

A slightly different formulation of the *Gertz* test was set forth in *Lerman v. Flynt Dist. Co., Inc.*, 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

> "A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media." *Id.* at 136-37.

> sports and consequently in the highly competitive recruiting of high school athletes. With such status, therefore, *we find that the public controversy requirement of Gertz is met by the existence of the nationwide controversy regarding the recruitment of college athletes.*" *Warford v. Knight Ridder Newspapers, Inc.*, No. 86-CI-4251 (Fayette Circuit Court, Jan. 5, 1989) (final summary judgment) [hereinafter "Summary Judgment"] at 3.

Appellant does not dispute the factual underpinnings of the trial court's ruling on the public controversy requirement. Instead, he asserts the controversy identified lacks the specificity or particularity which the Supreme Court and other federal courts have required. We agree.

The "nationwide controversy regarding recruitment of college athletes" is too general a statement of a public controversy to be the axis of debate. *Cf. Wolston v. Readers Digest*, 443 U.S. at 166 n. 8 ("no public controversy or debate in 1958 about desirability of permitting Soviet espionage in the United States"), *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1116 (N.D.Cal. 1985) ("little or no dispute that violation of NCAA rules was improper"). Certainly, in 1985 there was no legitimate controversy or debate about the desirability of NCAA rules violations.

The First Amendment protects the "principle that *debate on public issues* should be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. at 270 (emphasis added). Newsworthy though NCAA recruiting violations at the University of Pittsburgh may have been, public interest alone does not create a public controversy, nor does it create a public figure. *Wolston v. Reader's Digest*, 443 U.S. at 167; *Time v. Firestone*, 424 U.S. at 454. A general public concern about recruiting violations, like

the general public concern about wasteful public expenditures is not sufficient to qualify a grant recipient or assistant basketball coach as ~~a public~~ figure if neither is surrounded by a specific controversy. *See Hutchinson v. Proxmire*, 443 U.S. at 135.

We reject the use of "subject matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods." *Id.* Consequently we cannot agree with the trial court that because the University of Pittsburgh enjoys the status of an NCAA Division I school which is highly competitive in recruiting athletes for its sports programs, the *Gertz* public controversy requirement is met by the existence of a general public concern over recruitment of college athletes.

Appellees argue that *Gertz* does not require a narrowly defined controversy, but if we disagree, they suggest we may nevertheless rely on a speculative finding of a local controversy by the trial court as follows:

> "In the case at bar, evidence was presented that a specific controversy regarding recruitment *may have* existed during the plaintiff's tenure at the University of Pittsburgh. We, however, do not believe that we must find a specific controversy, such as was found in *Barry*, at the University of Pittsburgh during the tenure of the plaintiff in order to find that the plaintiff is a limited public figure." Summary Judgment at 3.

In deciding that a local public controversy was not necessary to meet the public controversy requirement, the trial court rejected the holding in *Barry v. Time*, 584 F.Supp. 110 (N.D. Cal. 1984). We find the *Barry* court's

approach instructive in analyzing the public figure question before us. Furthermore, the factual contrasts help to explain the different result we achieved in the case at bar.

In *Barry* the University of San Francisco's head basketball coach, Peter K. Barry, was accused in a *Sports Illustrated* article of involvement in NCAA recruiting violations. Barry sued for libel, but the issue of his status as a public figure arose before trial. Unlike appellant, Barry had been hired as *head* coach for the specific purpose of cleaning up USF's basketball program, which was investigated in previous years by both the NCAA and the university for alleged recruiting improprieties. The record in this case fails to reveal that a similarly charged atmosphere prevailed at the University of Pittsburgh at the time appellant accepted employment there.

The *Barry* court found Barry to be a limited purpose public figure. It began its analysis of the public figure controversy question by turning to a definition set out in *Waldbaum, supra.*

> "To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. *Id.* The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial

> ramifications for nonparticipants, it was a public controversy." *Id.*, 627 F.2d at 1297.

Applying the *Waldbaum* definition, the *Barry* court identified the qualifying public controversy as follows:

> "the public controversy involved the alleged recruiting violations at USF prior to Barry's acceptance of the position of head basketball coach." *Barry*, 584 F.Supp 1116.

The Court found that the outcome of the controversy could be expected to have a significant impact on the USF community by affecting the university's reputation. Then the Court clarified the exact nature of the controversy.

> "Moreover, although there may have been little or no dispute that violation of NCAA rules was improper, there certainly was a dispute as to what the university should *do* about allegations of recruiting violations." *Id.* at 1116.

Having narrowed the basis for debate to what USF and Barry should do about the allegations, the Court enlarged the affected public necessary in the *Waldbaum* definition by linking the precise controversy to "the larger public debate over the proper role of athletic programs at institutions of higher learning." *Id.* at 1116-17. The Court ultimately relied on *both* the local and national controversies to meet the public controversy requirement of *Gertz*.

> "This court finds that the 'public controversy' requirement of *Gertz* is met in the present case by the existence of the specific controversy at USF surrounding the NCAA investigations of the athletic department, and by the intimately related nationwide controversy over the proper role of athletics at institutions of higher learning. This public controversy affects the lives of a large number of people." *Id.* at 1117.

At Pittsburgh, there was no particular or ongoing controversy with which to link the general recruitment issue or controversy; thus, we cannot conclude that appellant was involved in a particular and identifiable public controversy. The Fayette Circuit Court was unable to determine that a specific controversy existed at Pittsburgh prior to appellees' publication. And there was no particular finding of a local controversy over recruiting at Pittsburgh when the defamatory statements were published.

Accordingly, we hold that the public controversy requirement of the *Gertz* test has not been met.

b. Involvement

Appellees have urged us to return to the "compelling normative consideration underlying the distinction between public and private defamation plaintiffs," recognized in *Gertz*, 418 U.S. at 344, to evaluate appellant's involvement in the public concern. They claim that the significant question in this case has always hinged on appellant's acceptance of the risk of closer public scrutiny. Appellees would diminish the Supreme Court's emphasis on the primary manner in which individuals accept this risk in order to become limited purpose public figures. Typically, they

> " . . . thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345.

Instead, appellees claim that it is irrelevant that appellant never publicly spoke out on recruiting issues

and did not enjoy name recognition or a prominent position in college basketball coaching. They assert that when an individual voluntarily becomes involved in an activity which he knows is the subject of intense public scrutiny, he becomes a public figure for purposes of comment on his actions.

The trial court found that appellant's reputation as a recruiter had attracted head coach Chipman to hire him at Pittsburgh, and that he was heavily involved in recruiting.

> "Through his position and recruiting activities the plaintiff has voluntarily injected himself into the public controversy surrounding the recruiting of college athletes, and that he assumed the risk that negligent defamatory remarks will be made about him."

The court went on to calculate that as an assistant coach and major recruiter at a Big East school, which was a Division I member of the NCAA, Warford had thrust himself into the public controversy surrounding college athletics.

Appellees rely on several distinguishable cases as authority. In *Rosanova v. Playboy Enterprises*, 580 F.2d 859, 861 (5th Cir. 1978), the plaintiff, found to be a public figure, had been "the subject of published newspaper reports and other media reports" of his associations with and activities in organized crime *before Playboy Magazine* referred to him as a "mobster." In *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072 (3rd Cir.), *cert. denied*, 474 U.S. 864 (1985), the plaintiff was an attorney who had gained notoriety by representing and associating with motorcycle gangs and was subsequently

indicted on federal drug charges *before Penthouse* published an article in which he was alleged to be an attorney criminal consort with drug traffickers. The court found that based on his voluntary associations with the gangs and the intense media attention he engendered, Marcone was a limited purpose public figure. But it was a "close case." *Id.* at 1086. We do not view appellant's notoriety to be of the same caliber as Rosanova's or Marcone's.

Appellees refer us to other sports figure cases, none of which are binding on this court. In addition to *Barry, supra,* we have considered *Chuy v. Philadelphia Eagles Football Club,* 431 F.Supp. 254 (E.D. Pa. 1977), *aff'd* 595 F.2d 1265 (3rd Cir. 1979), in which a professional football player sued for defamation based on a published report that he had a debilitating disease. His condition and the report were related to a contract claim he was also pursuing against his employer. The court concluded Chuy was a public figure based on his starting position with the Philadelphia Eagles, his well-publicized trade from Los Angeles, and the publicly sustained injury which triggered his contract dispute. *Holt v. Cox Enterprises,* 590 F. Supp. 408 (N.D. Ga. 1984) involved a highly unusual fact situation, which, briefly stated, sheds no light on appellant's public figure status. A professional jockey was accused of throwing a race at the Meadowlands in *Gomez v. Murdoch,* 475 A.2d 622 (N.J. Super. 1984). The court found the plaintiff, a six year veteran, to be a public figure for a limited purpose because as a professional jockey, he chose "to perform publicly in a sport which commands widespread interest, and regarding which the communications media regularly report." *Id.* at 625. Both *Chuy, supra,* and *Gomez* relied on the public prominence

assumed by professional athletes during their playing careers. As an assistant university basketball coach, appellant did not assume the type of prominence that head coaches presiding over controversial sports programs or professional athletes on the field attain.

We agree with appellees that the heart of the issue before us is whether appellant's employment was such that he accepted or assumed the risk of public scrutiny. We conclude that he did not. We cannot ignore the way in which the United States Supreme Court has itself applied the *Gertz* test, by "looking to the nature and extent of an individual's participation in the particular controversy." *Id.*, 418 U.S. at 352. In *Gertz*, the Court held that an attorney with extensive professional and community activities to his credit, who voluntarily associated himself with a case certain to attract media attention, was *not* a public figure. *See Wolston*, 443 U.S. at 167.

> "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Gertz*, 418 U.S. at 352.

If *Gertz* did not thrust himself into the vortex of controversy by assuming the representation of a controversial plaintiff in the narrowly drawn controversy surrounding the civil and criminal liability of police officers who shoot citizens, it is inconsistent to characterize an assistant basketball coach's recruiting activities at the University of Pittsburgh as the means by which he thrust himself into the public concern surrounding recruiting. This is particularly true in view of the fact that at the time appellant was hired, Pittsburgh had an unexceptional basketball program and competed in the Eastern Eight Conference,

which enjoyed less recognition than the Big East Conference which Pittsburgh joined several years later.

In *Firestone*, the Court considered whether the plaintiff had assumed a role of special prominence in the affairs of society or had thrust herself to the forefront of a particular controversy in order to influence the outcome of the issues and concluded she had not. *Id.*, 424 U.S. at 453. The Court found Wolston's participation in any possible controversy to be involuntary and his role to be minor if indeed there was a controversy. *Wolston*, 443 U.S. at 167. Further, Wolston did not attract public attention in order to influence the resolution of the issues. *Id.* at 168. Finally, in *Hutchinson*, the Court again found the plaintiff's failure to thrust himself into a public controversy to influence the outcome of the issues, as well as his failure to assume a role of public prominence in the controversy significant in concluding Hutchinson was not a public figure.

From the foregoing, we must conclude that Warford did not assume the risk of defamation to the extent or in the manner contemplated by the Supreme Court in *Gertz* and its progeny. His recruiting activities at a Division I NCAA school are not sufficient to accord public figure status.

c. Media Access

Appellant's access to the media for post-defamation rebuttal did not rise to the level of the regular and continuing access enjoyed by public figures. *Hutchinson*, 443 U.S. at 136. The fact that appellant received occasional press attention, or that one can reasonably speculate that

if the local media decided to publish an article on some nationwide recruiting controversy, a reporter might ask appellant for his views does not imply that he could just as easily have insisted his views be published.

For the foregoing reasons, we hold that appellant was a private figure at the time of the alleged defamation.

II. EVIDENCE OF ACTUAL MALICE

Appellant's second allegation of error concerns the trial court's judgment directing a verdict in favor of appellees on the grounds that appellant had not demonstrated actual malice by clear and convincing evidence. On retrial, appellant, as a private figure, will not be required to show actual malice in order to establish appellees' liability. *McCall, supra,* 623 S.W.2d at 886. However, if appellant succeeds in proving liability under the simple negligence standard, he must show actual malice in order to recover punitive damages. *Gertz, supra,* 418 U.S. at 349. KRS 411.051.

To show actual malice, a plaintiff must prove by clear and convincing evidence that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times, supra,* 376 U.S. at 279-80 (1964). The Supreme Court recently recapped the actual malice standard in *Harte-Hanks Communications, Inc. v. Connaghton,* 491 U.S. ___, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

> "Actual malice . . . requires at a minimum that the statements were made with a reckless disregard for the truth. And although the concept of

> 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' St. Amant v. Thompson, 390 US 727, 730, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968), we have made clear that the defendant must have made the false publication with a 'high degree of awareness of probable falsity,' Garrison v. Louisiana, 379 US 64, 74, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964), or must have 'entertained serious doubts as to the truth of his publication,' St. Amant, supra, at 731, 20 L.Ed.2d 262, 88 S.Ct. 1323." *Harte-Hanks,* 105 L.Ed.2d at 576.

To determine whether to submit appellant's proof of actual malice to the jury, "the trial judge in disposing of a directed verdict motion should consider whether a reasonable fact finder could conclude . . . that the plaintiff had shown actual malice with convincing clarity." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

> "Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate . . . question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.*, 477 U.S. at 255-56.

The trial court in the case at bar has heretofore decided that the evidence would not support a reasonable jury finding that appellant has shown actual malice by clear and convincing evidence. We disagree.

From our de novo review of the factual record in full, as required by *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), and *Harte-Hanks, supra,* 105 L.Ed.2d at 589, we

hold the evidence could support a finding of actual malice upon the basis that appellees must have entertained serious doubts as to the truth of their published charge that appellant offered money to Steve Miller. The relevant evidence pertains to a subjective determination of the appellee's state of mind. *Harte-Hanks*, 105 L.Ed.2d 5 at 562; *Herbert v. Lando*, 441 U.S. 153, 160, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). "[P]roof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred." *Herbert v. Lando*, 441 U.S. at 160. However, "unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination." *Id.* In *NCAA v. Hornung*, Ky., 754 S.W.2d 855 (1988), we held that " . . . malice may be inferred from a lack of probable cause in a malicious prosecution action."

Appellant presented conclusive evidence that appellees' made minimal efforts to verify Steve Miller's credibility. The reporters testified that they did not contact Miller's parents, friends, coaches or anyone else in whom he might have confided, in an attempt to check out the source of their story. Appellant testified that upon being confronted with the allegation shortly before the story's original publication, he asked reporter Michael York to check out specific sources, including Miller's parents. No one at the University of Pittsburgh, including Coach Chipman, was contacted prior to the October publication. No further investigation was conducted prior to the Reprint, despite the denials of appellant and others. While the failure to investigate before publishing is not sufficient to establish reckless disregard, *Harte-Hanks*, 105 L.Ed.2d at 562, we view it as probative of malice when

viewed cumulatively with other the evidence presented by appellant.

Appellees admitted they were aware of the gravity of the charge and potential harm to appellant. The defamatory publication was sent to all of his possible future employers in college basketball. This knowledge of potential harm should have heightened appellees' investigative efforts. The fact that it did not may be considered as evidence of malice. *Carson v. Allied News Co.*, 529 F.2d 206, 211 (7th Cir. 1976); *Goldwater v. Ginzburg*, 414 F.2d 324, 339 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

Appellees argue that their failure to investigate was vindicated by the fact that at trial appellant called none of the people he claims appellees should have interviewed prior to publication. They also assert that the evidence supported their decision not to believe Miller when he publicly retracted the statements about appellant shortly after publication. Whatever may have transpired after the fact is not controlling, the issue is state of mind at the time of publication.[3]

Appellees' reporters' story outlines included the Warford item as early as August and September of 1985. Despite this, appellant was not questioned about the allegations until October, just before the article was first published. Appellees admitted there was no time deadline motivating their failure to investigate or delay in confronting appellant. From the foregoing, a jury could

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[3] The trial court did not reach the issue of falsity in appellant's libel action.

reasonably believe that appellees were committed to running the story without regard to its truth or falsity.

Finally, we consider the characterization by appellees of Steve Miller's statement to the reporter.

> "Then I was told that I would be treated nice by the alumni, you know, if – he said if he signed the top player out of Kentucky, uh, that he would have a raise and, you know, that I would benefit from the raise also. So, you know." Plaintiff's Exhibit 19A at 14.

In a follow-up interview the next day, Miller repeated his claim and then the following exchange occurred:

> "YORK Sure. You really didn't get down to specifics? He didn't say well if you came, my raise would be x amount of dollars and you'd get your know, half of it or a third of it? He didn't get down to that I expect?
>
> MILLER Naw. Uh-huh (negative).
>
> YORK Did you get any feel for what he was talking about? Whether he meant like a hundred dollars or a thousand dollars or five thousand dollars?
>
> MILLER I was really kind of hesitate [sic] about talking about that because if I got to talking dollars and cents with him, then he would get the idea that at the right price, I could be bought to go to that school or whatever, so I didn't really get into that.
>
> YORK Uh-huh. I understand. I understand. That makes, uh, that makes perfect sense. But do you feel like that was definitely what he was talking about?

> MILLER Yeah. You know, just common sense on my part." Plaintiff's Exhibit 20A at 3-5.

From these ambiguous statements by Miller, appellees reported the following:

> "Steve Miller . . . told the newspaper that Pitt assistant coach Reggie Warford offered him money." NCAA Reprint at 14.

In addition to inadequately investigating the truthfulness of Miller's accusation, appellees' construction in favor of the most potentially damaging alternative of the ambiguous statement made against Warford, exaggerating the charge, "creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness." *Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). In view of all of the evidence presented during appellant's case in chief, we hold the trial court erred in directing a verdict for appellees on the issue of actual malice. Upon retrial, if the evidence presented is substantially the same and the jury finds for appellant, the issue of actual malice should be submitted.

III. EVIDENCE OF OTHER MISCONDUCT

In his final allegation of error, appellant asserts the trial court erred when it permitted the introduction of evidence of separate specific acts of alleged misconduct by him and others. Testimony was admitted which concerned the participation of so-called "recruiting aides" Patti Eyster and Irvin Stewart. Appellant was alleged to have arranged an after-school job with Eyster for Miller through which to funnel improper gifts of money from

Pittsburgh alumni. Stewart was a summer league coach who was also said to be assisting appellant in recruiting Miller by improper means.

In overruling appellant's motion *in limine*, the trial court held that any "bad acts" related to Miller's recruitment were relevant to show appellant's motive in offering Miller money. The court observed that the improper use of recruiting aids could show appellant's willingness "to step over the line" to recruit Miller.

Appellant contends this evidence was not admissible for the purpose of proving the truth of the defamatory publication due to the distinction between specific and general libel. Here, appellant was accused of the specific act of offering Miller money, as opposed to the general charge of having a corrupt disposition. Therefore, the truth of the accusation could not be proven by other specific bad acts. "There is a well-settled rule that the defendant may not justify this sort of charge by showing the plaintiff has committed other wrongful acts." 1A J. Wigmore, *Evidence in Trials at Common Law*, § 70.1 at p. 1488. (Tillers Rev., 1983). *See also Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rptr. 72 (1880); *Restatement (Second) of Torts*, § 581A, comment e and f.

Appellees counter that the other acts were "inextricably tied" to the ultimate issue of truth. Further, despite the general rule prohibiting evidence of other acts or conduct to prove a propensity toward misconduct, they claim the evidence was admissible to prove motive, identity, knowledge, scheme or plan. R. Lawson, *The Kentucky Evidence Law Handbook*, § 2.20(c), at 38-39. Appellees cite *Holdaway Drugs, Inc. v. Braden*, Ky., 582 S.W.2d 646 (1979),

where we held that evidence that the plaintiff was a drug user should be admitted to show motive in a defamation action. The plaintiff had worked in a drugstore, but was discharged for suspected theft of a controlled substance. His employer told him of his suspicions in the presence of other employees, and plaintiff sued. We said that on retrial,

> "the 'drug user' evidence should be admitted as relevant evidence whose probative value is not outweighed in the circumstances presented in this case by other elements which would permit its exclusion." *Id.* at 651.

The pertinent circumstances were that the plaintiff had been permitted to introduce evidence that the store owner's daughter was a drug user and had been barred from the store.

We are not convinced that appellant's use of "recruiting aids," if he did so use them as alleged, is probative on the issue of motive. While it may be reasonable to infer that if a person uses drugs, he might steal drugs, it is not reasonable to infer that appellant's enlistment of Eyster and Stewart to help recruit Miller was his motive for offering Miller part of his raise. The same desire or motive would seem to underlie both an offer of financial benefits and use of improper recruiters. While it may be reasonable to infer that "one step over the line" suggests a propensity, or at least a willingness, to break NCAA rules again, such is precisely the type of prejudicial evidence we cannot allow.

The general rule is well stated as follows:

> " 'evidence of other acts, even of a similar nature, of the party whose own act or conduct . . . is in question . . . is not competent to prove the commission of a particular act charged against him, *unless the acts are connected in some special way,* indicating a relevancy beyond mere similarity in certain particulars.' " *Massie v. Salmon,* Ky., 277 S.W.2d 49, 51 (1955).

In the absence of a special connection between the other alleged bad acts which warrant their admission, the Eyster and Stewart incidents are not admissible on the issue of malice, because appellees were unaware of these other acts at the time the defamatory statement was published. Thus, the other acts could not have contributed to appellees' belief in the truth of Miller's allegations. The evidence of specific acts was not admissible in mitigation of damages. *Daugherty v. Kuhn's Big K Stores,* Ky.App., 663 S.W.2d 748, 750 (1983); *Register Newspaper Co. v. Stone,* 31 Ky.L.Rptr. 458, 102 S.W. 800, 801 (1907). Nor were specific acts admissible to show appellant's character. *Daugherty,* 663 S.W.2d at 750. While character evidence may be admissible, in theory, in a defamation action where "character" is made an issue in the pleadings by the defendant's defense of truth, R. Lawson, *supra* at § 205, the evidence must pertain to general reputation and not to particular acts. *Louisville Times co. v. Emrich,* 252 Ky. 210, 66 S.W.2d 73 (1933).

To the extent that the Eyster and Stewart evidence was relevant to the jury's understanding of the reasonableness of Miller's belief that appellant offered him money, the probative value of this evidence was far outweighed by its potential for prejudice. Upon retrial, the

evidence concerning improper conduct by "recruiting aids" Patti Eyster and Irvin Stewart should be excluded.

For the foregoing reasons, the judgment of the Fayette Circuit Court is reversed and this cause remanded for retrial.

All concur.

ATTORNEYS FOR APPELLANT:

Elizabeth S. Feamster
Barry M. Miller
Fowler, Measle & Bell
4th Floor, Bank One Plaza
Lexington, KY 40507-1680

Larry S. Roberts
156 Market Street
Lexington, KY 40507

ATTORNEYS FOR APPELLEES:

Robert F. Houlihan, Jr.
James L. Thomerson
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, KY 40507

Edward O. Delaney
Kenneth H. Inskeep
Barnes & Thornburg
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, IN 46204

SUPREME COURT OF KENTUCKY

89-SC-181-TG

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
86-CI-4251

REGGIE WARFORD

APPELLANT

V.

THE LEXINGTON HERALD-LEADER COMPANY;
and JOHN S. CARROLL, Individually

APPELLEES

ORDER DENYING PETITION FOR REHEARING

Appellee's petition for rehearing is denied.

All concur.

ENTERED June 28, 1990.

/s/ Robert F. Stephens
Chief Justice

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

REGGIE WARFORD

PLAINTIFF

FEB 9 1989

NO. 86-CI-4251

VS. **DIRECTED VERDICT JUDGMENT**

THE LEXINGTON HERALD-LEADER CO.
and JOHN S. CARROLL, Individually

DEFENDANTS

* * *

This matter came on for jury trial on January 9, 1989. At the conclusion of Plaintiff's proof on January 25, 1989, Defendants moved for a Directed Verdict on the grounds that Plaintiff had failed to introduce sufficient evidence to support a jury verdict of actual malice. The Court having considered Defendants' Motion for Directed Verdict, having considered the evidence introduced at trial, and having considered all legal memoranda and argument of counsel, SUSTAINED Defendants' Motion for a Directed Verdict.

WHEREFORE, IT IS ADJUDGED BY THE COURT, that the Plaintiff take nothing by his Complaint and that the Complaint is hereby dismissed with costs to be paid by Plaintiff.

/s/ James E. Keller
JUDGE, FAYETTE
CIRCUIT COURT
FIRST DIVISION

TO BE ENTERED:

/s/ Larry S. Roberts
Hon. Larry Roberts
Fowler, Measle & Bell
4th Floor, Bank One Plaza
Lexington, KY 40507
COUNSEL FOR PLAINTIFF

/s/ Robert F. Houlihan, Jr.
Hon. Robert F. Houlihan, Jr.
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, KY 40507
COUNSEL FOR DEFENDANTS

CLERK'S CERTIFICATE

This is to certify that copy of the foregoing Directed Verdict Judgment has been mailed to the following counsel of record:

Hon. Larry Roberts
Fowler, Measle & Bell
4th Floor, Bank One Plaza
Lexington, KY 40507
COUNSEL FOR PLAINTIFF

Hon. Robert F. Houlihan, Jr.
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, KY 40507

and

Hon. Edward O. DeLaney
Barnes & Thornburg
1313 Merchants Bank Bldg.
11 South Meridian St.
Indianapolis, IN 46204
COUNSEL FOR DEFENDANTS

This 9th day of February, 1989.

/s/ (illegible)
CLERK, FAYETTE
CIRCUIT COURT

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

REGGIE WARFORD — PLAINTIFF

VS. OPINION 86CI-4251

KNIGHT-RIDDER NEWSPAPERS, INC.;
LEXINGTON HERALD-LEADER CO.; and
MICHAEL YORK, JEFFREY MARX, and
JOHN S. CARROLL, INDIVIDUALLY — DEFENDANTS

* * *

This matter is before the Court on the plaintiff's motion for partial summary judgment as to whether the plaintiff is a public figure. Without discussing the propriety of a motion for partial summary judgment to address solely that issue, we determine from the record, existing at the time of submission, that the plaintiff is not a public figure.

The landmark case in this area is *Gertz v. Welch*, 418 U.S. 323 (1974). In *Gertz*, the United States Supreme Court, set forth the difference between all purpose public figures and limited purpose public figures. A public figure for all purpose is one who occupies a position "of such persuasive power and influence that they are deemed public figures for all purposes." *Id.* at 345. In contrast, a limited purpose public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351.

The Court, in determining whether Gertz was a public figure, noted that "it is preferable to reduce the public-figure question to a more meaningful context by looking

to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352. Applying this analysis, the Court found that Gertz was not a public figure, despite all of Gertz's access to the media and involvement in public affairs.

It is clear that the plaintiff is not an all purpose public figure. The plaintiff was an assistant coach at the University of Pittsburgh, a job with little scrutiny. An assistant coach clearly does not occupy a position of persuasive power or influence.

Likewise, it appears that the plaintiff is not a limited purpose public figure. *Gertz* described a limited purpose public figure as someone who has "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

The controversy in the case at bar involves allegations of recruiting violations in college athletics, namely the plaintiff's activities as an assistance coach at the University of Pittsburgh. Naturally the plaintiff, as an assistance coach, engaged in some recruiting, however, it appears that he was not in charge of the recruiting program except for a brief period of time when there was a vacancy in the position of recruiting coordinator. That position belonged first to Seth Greenberg, and then to Jay Eck, once Greenberg left the University. The plaintiff's position with the basketball program was not as recruiting coordinator, but rather as an assistant coach. In fact, recruiting appears to have been only incidental to his position as an assistant coach.

Apparently, there was not any controversy regarding recruiting violations when the plaintiff was hired in 1980.

While other controversies may have occurred during the plaintiff's tenure at Pittsburgh, it appears that the plaintiff never thrust himself into these controversies nor did he try to influence their outcome. The plaintiff simply does not meet the standards set forth in *Gertz* for a limited purpose public figure.

The cases cited by the defendants discuss the notoriety and consequent public figure status accorded those who are *head* coaches (*Barry v. Time, Inc.*, 584 F.Supp. 1110 (N.D. Cal. 1984) or professional athletes (*Chuy v. Philadelphia Eagles Football Club*, 431 F.Supp. 254 (E.D. Pa. 1977); *Brooks v. Paige*, 12 Med. L.Rptr. 2352 (Colo. Dist. 1986)) or college athletes (*Holt v. Cox Enterprises*, 10 Med. L.Rptr. 1695 (N.D. Ga. 1984). None of these cases are applicable to the case at bar.

The *Barry* case is easily distinguished from the present case. Barry was the head basketball coach at the University of San Francisco (USF). He sued Sports Illustrated over some articles concerning recruiting violations which occurred at USF. The court found that Barry was a public figure for a limited purpose since he had voluntarily accepted a position where there was a controversy already existing.

The plaintiff in the case at bar was faced with a completely different situation than Barry. First, there was not a controversy at Pittsburgh when the plaintiff was hired. Moreover, the plaintiff was not hired by Pittsburgh to clean up their recruiting program, quite unlike Barry who was expressly hired to clean up the recruiting process at USF. Finally, and most significantly, the plaintiff in

the present case was *merely* an assistance coach, as compared to Barry who was the *head* coach at USF.

As far as distinguishing professional athletes, they are individuals who have voluntarily subjected themselves to increased scrutiny. The plaintiff in the case at bar has never played professional sports. Professional athletes, by their very occupation, invite attention and comment. Such individuals occupy a position far removed from that of the plaintiff. We feel that the position of assistance coach in and of itself does not invite attention and comment to the degree necessary to hold that a person who occupies such a position to be a public figure.

Finally, as for the defendants' cases concerning college athletes and their public figure status, it is abundantly clear that these cases, as well, are irrelevant to the case at bar. The courts in these cases found the college athletes to be public figures for the limited purpose of comment on their athletic performance. Since the controversy in the present situation centers around recruiting violations, rather than the plaintiff's athletic performance, these cases have no relevance to the case at bar.

The plaintiff simply does not meet the requirements of the case law for being a public figure. First, there was not even a hint of controversy regarding recruiting violations at Pittsburgh when the plaintiff was hired. In fact, the plaintiff was in no way connected to any controversy surrounding college athletic recruiting until the defendants published their articles. Second, the plaintiff clearly did not thrust himself into any controversy regarding

illegal recruiting nor did he attempt to influence its outcome.

The plain and simple fact is that the plaintiff was a background figure at Pittsburgh. As assistant coach, he received very little, if any, media attention. To the extent that he did receive any media coverage it does not appear related to the issue of recruiting violations. The plaintiff was not someone who invited attention and comment. Thus, the plaintiff is not a public figure.

/s/ James E. Keller
JUDGE, JAMES E. KELLER

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

REGGIE WARFORD		PLAINTIFF
VS.	OPINION	86-CI-4251
KNIGHT-RIDDER NEWSPAPERS, INC.; ET AL.		DEFENDANTS

* * *

This matter is now before the Court on the defendants' motion for the Court to reconsider its prior ruling that the plaintiff is not a public figure. We based our previous decision on the record existing at the time of the submission of the plaintiff's motion summarily seeking a determination of the plaintiff's status.

The parties now agree that the record is complete and no further evidence will be introduced regarding this issue. Accordingly the parties have agreed that the issue of whether the plaintiff is a public figure is now submitted on the record for a final decision by the Court. We reverse our prior finding, and we now find that the plaintiff is a limited purpose public figure.

As stated in our previous opinion, *Gertz v. Welch*, 418 U.S. 352, 94 S.Ct. 3013 (1974), is the landmark case in this area and continues to control. In *Gertz*, the court held that there are two types of public figures 1) those who attain this status by occupying positions of such persuasive power and influence that they are deemed public figures for all purposes or, more commonly 2) those who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the

issues involved. The latter are limited public figures. Both parties agree that the plaintiff is not an all purpose public figure, since there is no "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society. . . . " *Id.* Thus, the question is whether the plaintiff is a limited public figure.

In order to determine whether the plaintiff is a limited public figure under *Gertz* we must first identify the public controversy and then examine the plaintiff's conduct regarding the controversy. The plaintiff, relying on *Barry v. Time*, 584 F. Supp. 1110 (1984) and *Hutchinson v. Proxmire*, 443 U.S. 323 (1974), argues that there must have been a specific public controversy at the University of Pittsburgh involving recruiting during the plaintiff's employment in order to classify the plaintiff as a limited public figure.

In *Barry* the court held that the public controversy requirement of *Gertz* was met by the existence of a specific controversy at the University of San Francisco prior to Barry's acceptance of the position of head basketball coach *and* also by the related nationwide controversy over the proper role of athletics at institutions of higher learning. The court in *Hutchinson*, held that the plaintiff was not a public figure because a public controversy did not exist. The court stated that "at most, they (the defendants) point to concern about general public expenditures" which is a concern shared by most and is not sufficient to make Hutchinson a public figure. The court stated that if it were, everyone who received or benefited from public grants for research could be classified as a public figure.

In the case at bar, evidence was presented that a specific controversy regarding recruiting may have existed during the plaintiff's tenure at the University of Pittsburgh. We, however, do not believe that we must find a specific controversy, such as was found in *Barry*, at the University of Pittsburgh during the tenure of the plaintiff in order to find that the plaintiff is a limited public figure. It is undisputed by the plaintiff that a general public controversy existed concerning the proper recruitment of athletes in college sports. This public controversy is a real dispute, the outcome of which not only affects the general public but more obviously colleges in general and more specifically universities heavily involved in sports.

As a school belonging to the prestigious Big East Conference and a member of Division I of the National Collegiate Athletic Association (NCAA), the University of Pittsburgh is an example of a university heavily involved in sports and consequently involved in the highly competitive recruiting of high school athletes. With such status, therefore, we find that the public controversy requirement of *Gertz* is met by the existence of the nationwide controversy regarding the recruitment of college athletes.

The next prong of the *Gertz* model in determining whether the plaintiff is a limited public figure requires an examination of the plaintiff's conduct in the controversy. We do not need to determine the plaintiff's qualifications as an assistant coach but rather his involvement in the recruitment of athletes. As the record now reflects the plaintiff was an assistant coach heavily involved in recruiting. The plaintiff has stated that his reputation as a recruiter attracted the headcoach at Pittsburgh to offer

him a job as an assistant coach. Recruiting is listed as one of the plaintiff's primary duties on his resume when trying to attract prospective employers. As an assistant coach at a major university such as the University of Pittsburgh, he had more than a trivial or tangential role in the ongoing controversy surrounding college athletics. One of the most important considerations in making this determination is the fact that it can now be determined from the existing record that the plaintiff was heavily involved in recruiting and was directly responsible for recruiting numerous highly sought high school players. The plaintiff has testified as to the many players which he is responsible for recruiting to play at the University of Pittsburgh. The plaintiff was also chosen to be in charge of the recruiting program at the University of Pittsburgh while there was a vacancy as recruiting coordinator.

One factor considered in *Gertz* in determining a public figure is access to the media to correct factual misstatements: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 418 U.S. 344, 94 S.Ct. 3009. We believe that a person who is an assistant coach in a major college program closely covered by the sports media may readily avail himself of the media. This is especially true for an assistant coach who has obtained the status of the plaintiff as a recruiter of major players. It is obvious to us that the plaintiff would have been one of the first persons to be interviewed by the news media about any controversy involving recruiting at the University of Pittsburgh. Additionally, the Pittsburgh news media would logically

have sought out the plaintiff for his comments for any local news articles regarding the national recruiting controversy.

Another consideration in *Gertz* is based on an "assumption of risk rationale:

> [T]here is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . . .
>
> Those classed as public figures stand in a similar position.

Id. 344-45, 94 S.Ct. 3009.

Through his position and recruiting activities the plaintiff has voluntarily injected himself into the public controversy surrounding the recruiting of college athletes, and he has assumed the risk that negligent defamatory remarks will be made about him. While the position of assistant coach alone does not make the plaintiff a limited public figure, his position along with his conduct as a major recruiter as the University of Pittsburgh, a school in the Big East Conference and a Division I member of the NCAA, does thrust the plaintiff into the public controversy surrounding college athletics. Under the foregoing facts as are now presented to the court we have no difficulty in agreeing with the plaintiff that:

> As a public figure I understand the consequences of being in the public eye. I also know that by being in this profession, there are pitfalls

> and we, as coaches, are in the proverbial fish-bowl. . . .
>
> Reggie Warford, 1985

We therefore find and adjudge that the plaintiff is a public figure for the purpose of this litigation. Accordingly, the plaintiff will be required to prove that the alleged false statement was published by the defendant with "actual malice."

/s/ James E. Keller
JUDGE, JAMES E. KELLER

CERTIFICATE

This is to certify that a true copy of the foregoing opinion was hand delivered this 5th day of January, 1989, to the following: Hon. Larry Roberts and Hon. Robert Houlihan, Jr.

BY /s/ Roberts Smith DC

(2)

No. 90-765

In The

Supreme Court of the United States

October Term, 1990

THE LEXINGTON HERALD-LEADER COMPANY
and JOHN S. CARROLL,

Petitioners,

vs.

REGGIE WARFORD,

Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

LARRY S. ROBERTS
ROBERTS & SMITH
167 West Main
Second Floor
Lexington, Kentucky
40507

ELIZABETH S. FEAMSTER
(Counsel of Record)
BARRY M. MILLER
FOWLER, MEASLE & BELL
4th Floor - Bank One Plaza
Lexington, Kentucky 40507
(606) 252-6731

- Counsel for Respondent -

December, 1990

QUESTIONS PRESENTED

Whether the existence of a general concern regarding the proper recruitment of college athletes is a sufficient "particular public controversy" to strip an individual of the protections granted to private persons.

Whether, assuming the existence of a particular public controversy, a passive relationship to the controversy from a noninfluential position is sufficient to transform an individual into a limited purpose public figure.

Whether factual findings of a state court determining the lack of probative value of evidence are reviewable on federal constitutional grounds when the state court had no opportunity to consider the federal question.

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No. 90-765

IN THE
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October Term, 1990

THE LEXINGTON HERALD-LEADER COMPANY
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Petitioners,

vs.

REGGIE WARFORD,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Reggie Warford, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Kentucky. That opinion is reported at 789 S.W.2d 758 (1990) and may be found at Appendix 1 to the Petition.

OPINIONS BELOW

In addition to relying on those Opinions included in the Petition and Appendix thereto; Respondent has attached hereto, as Appendix 1, the Supreme Court of Kentucky's Order denying permission to supplement the Record on Appeal with a transcript made by Petitioners.

It appears that the transcript cited throughout the Petition is not part of the Record on Appeal. Neither is it available to Respondent. This was a videotaped trial, with no official written transcript. Respondent and this court, therefore, cannot review the cited material or verify its accuracy.

JURISDICTION

This Court lacks jurisdiction to review the judgment on writ of certiorari to the extent that review is sought of the third question presented by Petitioners, relating to the exclusion of nonprobative evidence by the Kentucky Supreme Court.

No federal question was timely or properly raised or determined. The issue was briefed, argued and resolved by the state court solely on the basis of state evidentiary law; thus defeating this Court's jurisdiction.

STATEMENT OF THE CASE

This statement is made in order to correct inaccuracies and omissions contained in the Petition.

The Publication

Respondent initiated this suit as a result of Petitioners' publication entitled the "NCAA Reprint." The allegations concerning the Respondent were printed in the Petition and need not be repeated here. This publication was sent to nearly every potential employer of the Respondent as well as being distributed at an NCAA convention in New Orleans. (Tape 10, 1/24/89, 09:30:19 - 09:38:09). Prior to the defamation, Reggie Warford had been gainfully employed as an assistant basketball coach for approximately ten years. Since the NCAA Reprint, Reggie Warford has not been able to get a coaching position. (Tape 3, 1/10/90, 16:17:48 - 16:29:43; 17:10:31 - 17:13:26). This, despite the fact that neither Reggie Warford nor the University of Pittsburgh received any NCAA sanctions as a result of these allegations. *Id.* at 16:40:43 - 16:41:16.

Respondent's Employment

When Petitioners published the NCAA Reprint in 1986 Reggie Warford was employed as an assistant basketball coach at the University of Pittsburgh (hereinafter "Pittsburgh"). Prior to that, he was an assistant basketball coach at Iowa State from 1976 - 1980. At Iowa he recruited players but was neither the chief recruiter nor the recruiting co-ordinator. At Pittsburgh, the same was true; Respondent had recruiting responsibilities, but was not the coordinator. (Tape 2, 1/10/89, 08:38:40 - 08:41:42). When Reggie Warford took the Pittsburgh job, the school was part of an obscure basketball conference, the Eastern Eight. Pittsburgh was known for football, with minimal attention given to basketball. (R.O.A., deposition vol. 15 at 25).

In 1983, Pittsburgh joined the Big East Conference which provided more television exposure and recruiting

advantages for the team. (Tape 2, 1/10/89, 08:51:44 - 08:55:30). The move did not increase the notoriety of assistant coaches. The head coach, Roy Chipman, testified that "Assistant coaches perennially or just, over the years, just don't get the kind of publicity that head coaches do." (R.O.A., deposition vol. 15 at 20). Respondent was in no position to make policy regarding the team. "You have to remember," Chipman testified, "that basically everything [that] was fed out of the basketball program, regardless of what it was, came through me." *Id.* at 231.

Petitioners' expert, Richard Lapchick, concurred with this view. Lapchick makes his living studying sports, in Boston - the heart of Big East territory. Lapchick testified that prior to the publication he had not heard of Reggie Warford. He further stated that assistant coaches receive little media attention; that there was no controversy concerning athletics at Pittsburgh when Warford was hired; that Warford was not a spokesperson on recruiting or on the proper role of sports in higher education; that Warford had never published on the issue of recruiting; that Warford had neither attempted to influence any controversy surrounding recruiting, nor change policies on recruiting, nor had he exerted discernible influence over the manner in which recruiting is done. Perhaps most importantly, Lapchick testified that Warford had not been personally involved in any recruiting controversy. (R.O.A., deposition vol. 16 at 100 - 104).

This is the individual whom Petitioners' seek to render a public figure - someone from a lower-level position with no sphere of influence and no history of active involvement in any form of a purported national controversy concerning athletics.

Proceedings Below

The trial court twice considered the public figure question. Initially the court determined Respondent to be

a private individual.[1] Five days before trial, the court reversed itself, holding that Respondent was a public figure. (Petitioners' Appendix at 49 - 54).

In a rare unanimous opinion, the Supreme Court of Kentucky reversed this ruling as well as an evidentiary ruling which had permitted irrelevant evidence to be admitted. (Petitioners' Appendix at 1 - 39). On the public figure question, the Kentucky court engaged in a lengthy and thoughtful review of this Court's previous opinions. *See, Warford v. Lexington Herald-Leader Co., supra* 761 - 766 or Petitioners' Appendix at 6 - 18 (hereinafter "Appendix"). The court then concluded that neither requisite for public figure status was met in this situation. The Kentucky court held that "the 'nationwide controversy regarding recruitment of college athletes' is too general a statement of a public controversy to be the axis of debate." *Id.* at 767 or Appendix at 21. It went on to find that:

> A general public concern about recruiting violations, like the general public concern about wasteful public expenditures is not sufficient to qualify a grant recipient or assistant basketball coach as a public figure if neither is surrounded by a specific controversy.

---

[1] The trial court held: "The plaintiff simply does not meet the requirements of the case law for being a public figure. First, there was not even a hint of controversy regarding recruiting violations at Pittsburgh when the Plaintiff was hired. In fact, the Plaintiff was in no way connected to any controversy surrounding college athletic recruiting until the Defendants published their articles. Second, the Plaintiff clearly did not thrust himself into any controversy regarding illegal recruiting nor did he attempt to influence its outcome.

"The plain and simple fact is that the Plaintiff was a background figure at Pittsburgh . . . . The Plaintiff was not someone who invited attention and comment. Thus, the Plaintiff is not a public figure." (Petitioners' Appendix at 47 - 48).

Id. at 767 - 768 or Appendix at 21 - 22, citations omitted.

After determining that there was no 'particular public controversy' the court proceeded to analyze Warford's participation and role based upon the standards and methods delineated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and its progeny. Disagreeing with Petitioners' position that "it is irrelevant that appellant [Respondent here] never publicly spoke out on recruiting issues and did not enjoy name recognition or a prominent position in college basketball coaching," the court concluded that Respondent's involvement in the public concern was insufficient to accord him public figure status. *Id.* at 769 - 771 or Appendix at 25 - 31.

The court then turned to an evidentiary ruling based upon state common law which the Petitioners' now desire to have reviewed upon federal constitutional grounds. Contrary to Petitioners' contentions, the Supreme Court of Kentucky concluded that the evidence to be excluded on retrial was *not* corroborative of the defense of truth. *Id.* at 773 - 74 or Appendix at 37 - 39. This issue was determined solely on state law grounds; no purported federal question was raised until Petitioners' [then Appellees] petition for rehearing. (Petition at 16. fn. 3). The court summarily denied the petition for rehearing without considering the question. (Petitioners' Appendix at 40). Thus, no substantial federal question was timely raised or decided.

REASONS FOR DENYING THE WRIT

The petition presents no credible questions for review by this Court. A review of the decision by the Supreme Court of Kentucky shows no conflict, direct or indirect, with precedent set by this Court and other federal

and state decisions. To the contrary, the Kentucky opinion correctly applies the principles and methods established by this Court for the determination of public figure status.

With regard to the evidentiary ruling, not only is Petitioners' failure to timely raise this issue jurisdictionally fatal; but the holding turns solely on an analysis of the factual findings. This matter is not of sufficient importance to warrant review as it involves only a question of evidence and the factual findings adduced therefrom.

1. The Decision Below Concerning Public Figures is Consistent with This Court's Prior Decisions

The Supreme Court of Kentucky correctly followed the controlling precedents set by *Gertz, supra; Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Wolston v. Readers' Digest Association, Inc.,* Inc., 443 U.S. 157 (1979); and, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). The Petitioners argue that the decision below was in error and misconstrued the applicable law. Petitioners are in error. The court below correctly applied the principles enunciated in *Gertz* to the facts present. The court below did not narrowly construe the issue; rather, Petitioners have chosen to narrowly interpret the court's decision.

A. The Court Below Correctly Held that the General Concern About College Athletics is not a Particular Public Controversy

In making the public figure determination, the lower court stated that it must first decide whether a "particular and identifiable public controversy" existed. *Warford, supra* at 766 or Appendix at 18. Despite Petitioners' allegations of a "national" controversy, the Kentucky court found, after reviewing the facts, that Petitioners' formulation was

"too general a statement of public controversy to be the axis of debate," stating that "[c]ertainly, in 1985 there was no legitimate controversy or debate about the desirability of NCAA rules violations." *Id.* at 767 or Appendix at 21. The Kentucky court compared the case at bar to the situations existing in *Wolston v. Readers' Digest, supra*, and *Time, Inc., v. Firestone, supra*, and concluded that the "public controversy requirement of the *Gertz* test ha[d] not been met." *Warford, supra*, at 769 and Appendix at 25.

Petitioners mistakenly characterized the Kentucky court's holding to require a pre-existing local controversy. The Supreme Court of Kentucky not only found that no specific controversy existed in which Respondent could be involved, they also (and primarily) held that the general concern advanced by Petitioners was insufficient to rise to the level of a "controversy." As this Court has noted: "It is difficult to determine with precision the 'public controversy' in to which petitioner is alleged to have thrust himself." *Wolston, supra,* at 166 fn. 8.

The allegedly conflicting decisions argued by Petitioner are easily reconcilable on their facts. *Tavoulareas v. Piro,* 817 F.2d 762 (D.C. Cir. 1987)(en banc), *cert. denied,* 484 U.S. 870 (1987) (corporate president was activist supporting industry and limited-purpose public figure for controversy concerning the need to reform the structure and management of private oil industry); *Lerman v. Flynt Distrib. Co.,* 745 F.2d 123 (2d Cir. 1984)(controversial author of racy fiction on the issues of contemporary standards of nudity in print and film and sexual mores). Clearly the controversies defined in the cases above stand in stark contrast to the vague general concern advanced by petitioners as a public controversy.

Despite Petitioners' claim that a controversy existed in this case, the law and principles established by this

Court are clear. There is no conflict in the method in which the courts above and the Kentucky court decided the public controversy question, and no infringement on the right of free speech. The Kentucky court simply applied the *Gertz* principles to the specific facts of this case. Thus there is no "conflict" requiring this Court's review.

B. Respondent's Role in Any Controversy Was Too Minute to Deprive Him of Private Individual Status

Even had a sufficient particular public controversy existed in this case (which it did not), Respondent still remains a private individual due his insignificant role in any such controversy. Again Petitioners have narrowly construed and mischaracterized the Kentucky opinion. It did not state and does not hold that Respondent is not a public figure solely because he has not 'spoken' out as Petitioners would have this Court believe. Rather, the opinion stands for the proposition that, under the *Gertz* standard of "looking to the nature and extent of an individual's participation in the particular controversy," *Gertz, supra,* at 352, "[r]espondent did not have a sufficient role in any purported controversy to be a public figure." *Warford, supra*, at 769 - 771 or Appendix 25 - 29.

Although the Kentucky court reviewed and analyzed this Court's prior opinions, it disagreed with Petitioners' reading of these cases, and correctly concluded under the standards adopted by this Court that Respondent had not assumed the risk of public scrutiny. *Warford* at 770 or Appendix at 28. Further, common sense dictates that if a controversy is defined as broadly and generally as the Petitioners argue here, it is inconceivable that a lower-level

assistant could have the power and ability to influence the resolution. [2]

Petitioners have not demonstrated that conflicting decisions exist on this issue. Reduced to its essence, Petitioners' claims merely reflect a disagreement with the results reached by the lower court, not the principles and methods employed. As before, the conflicts cited by Petitioners are easily distinguished on their facts, *Trotter v. Anderson*, 818 F.2d 431 (5th Cir. 1987) (plaintiff was the president of a bottling company, and was a central figure in a publicized union battle); *McDowell v. Paiewonsky*, 769 F.2d 942 (3rd Cir. 1985) (plaintiff was a high-profile architect, inextricably connected in public's mind with public projects he built) (*Clyburn v. New World Communications, Inc.*, 993 F.2d 29 (D.C. Cir. 1990)(plaintiff was a consultant who held contracts with the District of Columbia, was socially connected with a drug scandal involving city officials, and made false public statements concerning the drug controversy).[3]

As the Kentucky Court found, the Respondent, Reggie Warford, stands in contrast to these influential positions. He did not speak out on recruiting, had not published on the subject, exerted no influence over the

---

[2] As was noted in *Waldbaum v. Fairchild Publications*, Inc., 627 F.2d 1287, 1297 fn. 27 (D.C. Cir. 1980) *cert. denied*, 449 U.S. 898 (1980): "We do not believe it necessary to state that a court should define the controversy 'narrowly' or 'broadly.' A narrow controversy will have fewer participants overall, and thus fewer who meet the required level of involvement. A broad controversy will have more participants, but few can have the necessary impact."

[3] *See also: Marcone v. Penthouse Int'l. Magazine for Men*, 754 F.2d 1072 (3rd Cir.), *cert. denied*, 474 U.S. 864 (1980)(plaintiff indicted for drug trafficking, had represented "notorious" motorcycle gangs, and had social ties with the gangs); *Dameron v. Washington Magazine*, 779 F.2d 736 (D.C. Cir. 1985) *cert. denied*, 476 U.S. 1141 (1986)(plaintiff was a central figure in the specific and discrete public controversy surrounding an airliner crash).

manner in which recruiting was done, and was not personally involved in any recruiting controversy. He was an individual from a lower level non-decision making position who was not well-known within his industry. *See* Statement of the Case, *supra*, at 4. Indeed, he was not known to the President of the NCAA until that individual was contacted by Petitioners to testify. (R.O.A. deposition of Bailey, vol. 12 at 48 - 49).

Hence, there is no conflict between the decisions of this Court, those of other assorted courts, and the Kentucky Court. Petitioners simply have failed to correctly interpret *Gertz, supra,* or to demonstrate that any other court has interpreted *Gertz* as they have, or to show any intrusion into the rights guaranteed by the First Amendment. In the language of *Gertz, supra*, at 345, Respondent did not "thrust [himself] to the forefront of any particular public controversy [by word, deed, or position] in order to influence the resolution of the issues involved." This decision does not merit review.

2. The Evidentiary Ruling Below is not Subject to Review

As stated in previous sections, the evidentiary ruling excluding evidence of other purported bad acts was rendered solely on state law grounds. Petitioners acknowledged that they first raised a federal question in their petition for rehearing. (Petition at 16 fn. 3). Raising a federal question for the first time in a petition for rehearing to the state high court is insufficient for United States Supreme Court jurisdiction to attach, unless the state court entertains the petition and expressly decides the federal question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

In the present case, the Supreme Court of Kentucky issued a one-line order that stated "Appellee's petition for rehearing is denied." (Petitioners' Appendix at 40). The order denying rehearing in no way indicated that a federal question was considered. Thus, the judgment is not reviewable. *Radio Station WOW v. Johnson, supra*, at 128; *Forbes v. State Council*, 216 U.S. 396, 399 (1910).

Neither can Petitioners allege surprise. They could have raised any purported federal question prior to this time, in briefs before either the trial court or the state supreme court, but chose not to do so. As the petition for rehearing was not Petitioners' first opportunity to assert the question, jurisdiction does not attach. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

Even if the question had been raised timely, this issue is not appropriate for review. Petitioners ask this Court to examine and reverse a ruling based solely upon factual findings by the Kentucky court that the excluded evidence is not probative of the truth/falsity of Petitioners' allegations. Effectively, Petitioners ask this Court to resolve an underlying factual dispute, *not* constitutional questions. As this Court stated long ago "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

In the final analysis, the Supreme Court of Kentucky correctly decided a state evidentiary question on adequate and independent state grounds, without a federal question being put before it. The facts relating to that evidentiary ruling and the ruling itself do not merit this Court's consideration.

CONCLUSION

For all the reasons stated, both hereinabove and in the opinion of the Supreme Court of Kentucky, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ELIZABETH S. FEAMSTER
(Counsel of Record)
BARRY M. MILLER
FOWLER, MEASLE & BELL
Bank One Plaza
Fourth Floor
Lexington, Kentucky 40507

LARRY S. ROBERTS
ROBERTS & SMITH
156 Market Street
Lexington, Kentucky 40507
Counsel for Respondent

APPENDIX

SUPREME COURT OF KENTUCKY

89-SC-181-TG

REGGIE WARFORD — APPELLANT

V.

APPEAL FROM
FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
86-CI-004251

LEXINGTON HERALD-LEADER
COMPANY, ET AL. — APPELLEE

ORDER

The parties' joint motion for an extension of time in which to file their briefs in the above-styled action is granted. Appellant shall file his brief within sixty (60) days of the date of the entry of this order. Appellees' shall file their brief within sixty (60) days of the date of the filing of appellant's brief.

The parties' joint motion to supplement the record on appeal with a partial, unofficial transcript of the proceedings before the Fayette Circuit Court in the above-styled action is denied.

Vance, Wintersheimer, Combs and Gant, JJ., sitting. All concur.

ENTERED May 31, 1989.

/s/ Robert F. Stephens
Chief Justice

No. 90-765

In The

Supreme Court of the United States

October Term, 1990

THE LEXINGTON HERALD-LEADER COMPANY
and JOHN S. CARROLL,

Petitioners,

vs.

REGGIE WARFORD,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

REPLY MEMORANDUM TO BRIEF IN OPPOSITION

EDWARD O. DELANEY
KENNETH H. INSKEEP
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204

ROBERT F. HOULIHAN, Jr.
JAMES L. THOMERSON
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507

RICHARD J. OVELMEN
(Counsel of Record)
LANDON K. CLAYMAN
BAKER & MCKENZIE
Suite 1600, Barnett Tower
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 789-8900

– Attorneys for Petitioners –

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CASES

No. 90-765

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On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

REPLY MEMORANDUM TO BRIEF IN OPPOSITION

Petitioners The Lexington Herald-Leader Company and John S. Carroll offer the following points in reply to Respondent's Brief In Opposition to the Petition for a Writ of Certiorari to the Supreme Court of Kentucky.

1. Reply To Representations Concerning The Trial Transcript

Respondent states "the transcript cited throughout the Petition is not part of the Record on Appeal" and is not "available to Respondent." Respondent asserts that

neither this Court nor respondent can "review the cited material or verify its accuracy" because this was a "videotaped trial, with no official written transcript," and because the Kentucky Supreme Court denied permission "to supplement the Record on Appeal with a transcript made by Petitioners." (R. Br. at 2). Petitioners are surprised by the lack of candor shown here.

The transcript was made by a court reporter and submitted to the Kentucky Supreme Court by both the appellant (respondent here) Mr. Warford and the appellees (petitioners) in a Joint Motion to Supplement Record on Appeal. The Joint Motion is attached as part of the Supplemental Appendix hereto and is signed by respondent's counsel of record in this Court. It states in part:

> The parties state that supplementation of the record on appeal with this transcript will benefit the Court and the parties by providing them the option of working with and citing to the transcript whenever possible, rather than having to exclusively use the video record. Since the transcript will be supplemental to the video record, the video will still be available to the parties and the Court for use in matters not included in the transcript. This appeal can be advanced more efficiently and economically through the use of the transcript and, therefore, the parties urge the Court to permit the record on appeal to be supplemented as requested.

(Supp. App. 1-2). While it is true the Supreme Court of Kentucky chose to rely only upon the video recording of the trial, this Court may choose otherwise if it accepts jurisdiction. Should jurisdiction be accepted, petitioners would move the Court to supplement the record with the transcript, and certainly provide a copy to respondent,

since he apparently was not permitted to retain one by counsel below.

Respondent's claim that he cannot verify the accuracy of any factual representation made in the Petition is meritless since the transcription is of a video recording respondent does have. Indeed, had respondent's counsel only informed counsel of record for petitioner that she needed a copy of the transcript, it would have been timely provided.

2. Reply To Jurisdictional Argument

Respondent argues that this Court lacks jurisdiction to review "the third question presented by Petitioners . . . . " (R. Br. 2, 11-12). He is mistaken. The federal question was timely raised in Appellees' Petition for Rehearing. (Supp. App. 5-15). The federal question was raised by the following express argument:

> D. The Ruling Impermissibly Burdens The Presentation Of Evidence On The Issue Of Truth
>
> The Court in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) held, as a matter of First Amendment law, that "the common law's rule on falsity – that the defendant must bear the burden of proving truth – must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776. It is Warford's burden to prove that the statements made about him were false. The effect of this Court's ruling precluding the admission of evidence of the use of recruiting

> aides is to deprive the newspaper of the opportunity to present contrary evidence on the issue of the statement's alleged falsity. Such an effect is constitutionally impermissible.

(Supp. App. 15-16). This Court has repeatedly held there is jurisdiction over a federal question raised on rehearing in the state's highest court following, and necessitated by, the court's surprising departure from state law precedent. *Cole v. Arkansas*, 333 U.S. 196, 200 (1948); *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1945); *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-7 (1932). Respondent presents no argument that the ruling of the Supreme Court of Kentucky was not a surprising departure from prior state law, even though no other Kentucky case has held that the component elements of an illicit scheme or plan are inadmissible as "other acts." Petitioners' survey of Kentucky law in the Appellees' Petition for Rehearing demonstrates just how surprising a departure this was from both the decision of the trial court and all other relevant Kentucky precedents. (Supp. App. 6-14).

3. Reply To Respondent's Statement Of The Case

Respondent's Statement of the Case attempts to paint Warford as an obscure figure not worthy of public comment. (R. Br. 2-6). To this end, respondent twice notes there was no recruiting controversy at the University of Pittsburgh when Warford was hired. (R. Br. 4, 5 n.1). But this fact is not at all relevant to the issues. Warford was formerly the captain of the University of Kentucky basketball team. He returned to Lexington, Kentucky, to recruit Steve Miller, Kentucky's "Mr. Basketball," the

year's most celebrated Kentucky high school basketball player. He did this because his (Warford's) public reputation was strongest in Kentucky, so his recruiting was most efficacious there, and because he knew his national reputation as a recruiter would be greatly enhanced by recruiting "Mr. Basketball" from Kentucky. The absence of a specific recruiting controversy at Pittsburgh is irrelevant to the newsworthiness of the report, or to Warford's assumption of the risk of adverse public comment based on his activities in Kentucky.

Even more to the point, Pittsburgh hired Warford following the 1980 basketball season. The NCAA Reprint, the subject of Warford's libel suit, was published to its national NCAA audiences in January 1986, long after Pitt joined the Big East Conference following the 1981-82 season, and after Warford tried in 1983 to recruit Miller to play in that celebrated league. Clearly, whether there was a recruiting controversy at Pittsburgh six years earlier should not be dispositive of whether Warford should be deemed a "public figure" for purposes of the publication of the NCAA Reprint in 1986. In fact, the record is uncontradicted that there was a recruiting controversy at the University of Pittsburgh, revealed in large measure in the original *Herald-Leader* series, by the time the NCAA Reprint was published.

4. Reply To No Public Controversy Argument

Respondent argues the Supreme Court of Kentucky correctly held that the mere "general concern" about "college athletics" is not a "particular public controversy." (R. Br. 7-9). This argument is scarcely credible.

There can be no question that there has been a raging national public controversy regarding regulation of the recruiting of college athletes by universities acting under NCAA rules. The controversy may be fundamental, complex, and national in scope, but it is not "vague," nor may it be dismissed as a "mere general concern." The controversy reflects upon the integrity of the administration and management of our universities as well as our entire system of collegiate athletics.

The issue is not the rather obtuse query of whether "in 1985 there was no legitimate controversy or debate about the desirability of NCAA rules violations," as the Kentucky Supreme Court and respondent state. (R. Br. 8, *quoting, Warford*, 789 S.W. 2d 758, 767 (Ky. 1990)). The controversy encompasses such issues as whether the NCAA recruiting rules make sense; whether they are being observed by the schools and their recruiters; whether they are being enforced by the NCAA; what consequences result from wholesale violation of, or adherence to, the rules; and what reforms may be needed to prevent the exploitation of minority student-athletes. Respondent's suggestion that this controversy is so much less precise than national controversies regarding "contemporary standards of nudity in print and film and sexual mores" or "the need to reform the structure and management of private oil industry" is completely unpersuasive. (R. Br. 8; *citing, Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir.) (*en banc*), *cert. denied*, 484 U.S. 870 (1987); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984).

Respondent charges that the Petition has mischaracterized the opinion of the Supreme Court of Kentucky by

stating that the decision requires a pre-existing local controversy. But that is precisely what the opinion does. The Kentucky Supreme Court began by asserting that

> The "nationwide controversy regarding recruitment of college athletes" is too general a statement of a public controversy to be the axis of debate.

(App. 21). The court then proceeded to review the evidence with respect to the type of controversy it considered necessary, to wit: a pre-existing controversy over recruiting at Pittsburgh, and concluded there was no such controversy. In fact, the opinion held that even if there were a general national recruiting controversy, there must also be a local one at Pittsburgh:

> At Pittsburgh, there was no particular or ongoing controversy with which to link the general recruitment issue or controversy; thus, we cannot conclude that appellant was involved in a particular and identifiable public controversy.

(App. 25).

It is respondent who has mischaracterized the opinion below, and for good reason. The upshot of the Kentucky Supreme Court's decision is that as a controversy is more important, complex, and national in scope and scale, the less likely it is that expression concerning the controversy will be protected. This cannot be the law.

5. Reply To Argument Denying Respondent's Involvement In Any Public Controversy

Respondent's final point is that his involvement in any controversy was too minute to render him a public

figure. (R. Br. 9-11). Again, respondent mistakenly accuses the Petition of mischaracterizing the opinion below, stating that the court did nothing more than conclude the respondent "had not assumed the risk of public scrutiny." (R. Br. 9). But it is undisputed that Warford attempted to recruit the most publicized high school basketball player in Kentucky, for a highly publicized basketball program in what was one of the most highly publicized basketball conferences in America. And he did this to attract public notice of his school's program and his own recruiting skills. He sought this attention to obtain a head coaching position for himself. It cannot fairly be said he was not assuming the risk of public scrutiny. Indeed, respondent himself has admitted he did:

> As a public figure I understand the consequences of being in the public eye. I also know that by being in this profession, there are pitfalls and we, as coaches, are in the proverbial fishbowl. . . .

(R.O.A. Vol. 3 at 453).

Respondent's true argument is that his actions do not meet a surrogate standard for assumption of risk that he would impose upon this Court's "public figure" precedent. His argument is that he must have attempted to "resolve" a particular public controversy before he may be deemed a "public figure." He further argues that the controversy over NCAA regulation of the treatment and recruiting of college athletes is too great a controversy, and his role too small, for him to be deemed a "public figure."

This argument is wholly misconceived. First, it suggests that as a controversy becomes more fundamental,

more apparently intractable, and less capable of resolution by any one person, speech concerning that controversy and the actors in it should be afforded less protection by the First Amendment than is speech about small parochial controversies. But it is speech concerning just such intractable national controversies that the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is most intended to protect. Again, respondent's position cannot be the law.

Second, the argument entails that only a plaintiff's efforts to resolve a controversy will constitute activity which may be the predicate for speech protected by the *Sullivan* rule. However, many important participants in a public controversy are neither interested in resolving it, nor acting to do so. Some, like Warford, may actually worsen the chances for resolution. Nevertheless, speech about such figures is as important, if not more so, than speech about persons attempting a resolution. Participants, like the respondent, who willingly enter a public controversy motivated by self interest have assumed the risk of public scrutiny as clearly as those who are participating for the purpose of resolving it.

The teaching of respondent's case law is contrary to his position here and congruent to the argument presented by petitioners. None of the plaintiffs held to be "public figures" in the three cases cited resolved the controversy in which he was involved, nor was any of them able to, or interested in, trying to resolve it. *Clyburn v. News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987); *McDowell v. Paiewonsky*, 769 F.2d 942 (3d Cir. 1985).

The opinion of the Kentucky Supreme Court presents two disturbing paradoxes: the greater the public controversy, the less the protection afforded to speech concerning it; the more dysfunctional and self-serving a participant's role in a controversy, the more likely that criticism of his actions will be unprotected. Because these paradoxes are contrary to this Court's constitutional libel jurisprudence, and greatly "chill" and restrict our "robust, and wide-open" discussion of national public controversies, review of the opinion below should be granted.

Respectfully submitted,

RICHARD J. OVELMEN
(Counsel of Record)
LANDON K. CLAYMAN
BAKER & MCKENZIE
Suite 1600, Barnett Tower
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 789-8900

EDWARD O. DELANEY
KENNETH H. INSKEEP
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204

ROBERT F. HOULIHAN, JR.
JAMES L. THOMERSON
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507

Attorneys for Petitioners

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 89-SC-181-T

REGGIE WARFORD — APPELLANT

VS. APPEAL FROM FAYETTE CIRCUIT COURT
86-CI-4251

THE LEXINGTON HERALD-LEADER COMPANY; and, JOHN S. CARROLL, INDIVIDUALLY — APPELLEES

JOINT MOTION TO SUPPLEMENT RECORD ON APPEAL

* * *

Come the parties, by counsel, and jointly move the Court to enter an Order permitting the record on appeal to be supplemented with a partial, unofficial transcript of the proceedings before the Fayette Circuit Court.

The transcript was produced by court reporter Betty Hatfield who was retained by Appellees to attend and transcribe the trial. It consists of the testimony of all the witnesses who actually appeared at trial and includes the majority of trial evidence relating to the issues on appeal. The transcript does not include bench conferences or those conferences held in Chambers. Neither does it include deposition testimony or court rulings.

The parties state that supplementation of the record on appeal with this transcript will benefit the Court and the parties by providing them the option of working with and citing to the transcript whenever possible, rather than having to exclusively use the video record. Since the transcript will be supplemental to the video record, the

video will still be available to the parties and the Court for use in matters not included in the transcript. This appeal can be advanced more efficiently and economically through the use of the transcript and, therefore, the parties urge the Court to permit the record on appeal to be supplemented as requested.

Respectfully submitted,

ROBERT F. HOULIHAN, JR.
JAMES L. THOMERSON
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
Telephone: (606) 231-3000

EDWARD D. DeLANEY
KENNETH INSKEEP
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204

/s/ James L. Thomerson
COUNSEL FOR APPELLEES

ELIZABETH S. FEAMSTER
FOWLER, MEASLE & BELL
Fourth Floor, Bank One Plaza
Lexington, Kentucky 40507
Telephone: (606) 252-6731

LARRY S. ROBERTS
156 Market Street
Lexington, Kentucky 40507
Telephone: (606) 233-1104

/s/ Elizabeth S. Feamster
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing has been served by hand delivering a copy of same to Honorable James E. Keller, Judge, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky; this the 15th day of May, 1989.

/s/ Elizabeth S. Feamster
COUNSEL FOR APPELLANT

/s/ James L. Thomerson
COUNSEL FOR APPELLEE

ref:gen/gr
Warford V. HL

SUPREME COURT OF KENTUCKY

89-SC-181-TG

REGGIE WARFORD — APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
86-CI-004251

LEXINGTON HERALD-LEADER COMPANY, ET AL. — APPELLEE

ORDER

The parties' joint motion for an extension of time in which to file their briefs in the above-styled action is granted. Appellant shall file his brief within sixty (60) days of the date of the entry of this order. Appellees' shall file their brief within sixty (60) days of the date of the filing of appellant's brief.

The parties' joint motion to supplement the record on appeal with a partial, unofficial transcript of the proceedings before the Fayette Circuit Court in the above-styled action is denied.

Vance, Wintersheimer, Combs and Gant, JJ., sitting. All concur.

ENTERED May 31, 1989.

/s/ Robert F. Stephens
Chief Justice

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 89-SC-181-TG

REGGIE WARFORD — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
VS. NO. 86-CI-4251

THE LEXINGTON HERALD-LEADER COMPANY; and JOHN S. CARROLL, Individually — APPELLEES

APPELLEES' PETITION FOR REHEARING

* * *

Robert F. Houlihan, Jr.
James L. Thomerson
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
ATTORNEYS FOR APPELLEES

Edward O. DeLaney
Kenneth H. Inskeep
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204
ATTORNEYS FOR APPELLEES

This is to certify that a true and correct copy of the within Appellees' Petition for Rehearing has been served on Hon. James E. Keller, Judge, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky 40507; Elizabeth S. Feamster and Barry M. Miller, Fowler, Measle & Bell, 4th Floor, Bank One Plaza, Lexington, Kentucky 40507-1680, Counsel for Appellant; Larry S. Roberts, 156 Market Street, Lexington, Kentucky 40507, Counsel for Appellant; by mailing same, postage prepaid, on this the 16th day of May, 1990.

/s/Robert F. Houlihan
ROBERT F. HOULIHAN, JR.
JAMES L. THOMERSON

Stoll, Keenon & Park
1000 First Security Plaza
Lexington, Kentucky 40507
(606) 231-3001
ATTORNEYS FOR APPELLEES

PURPOSE OF PETITION

Appellees seek rehearing under CR 76.32 because this Court misconceived the law applicable to the evidentiary issue involving Patti Eyster and Irvin Stewart. This Court ruled that the trial judge on remand should exclude clearly admissible evidence that Eyster and Stewart were used by Warford to assist him in making direct and indirect offers of money to Steve Miller. The evidence shows that Warford formulated and enacted a scheme to recruit Miller in violation of NCAA rules. The component elements of this scheme included (1) his use of Stewart to offer Miller money, cars and other improper inducements; (2) his use of Eyster in order to funnel money to Miller from Pitt boosters; and (3) his offer to split his raise with Miller. The recruitment was so dominated by these events that the discussion of splitting Warford's raise can only be placed in context with proof of the entire recruitment.

This Court did not fully consider the effect its advance ruling will have on the retrial of this case. Excluding the evidence concerning Eyster and Stewart will hamstring the jury in judging the credibility of Miller and Warford and in deciding the issue of truth. It is impossible for a jury to determine who is telling the truth without knowing all of the facts underlying the relationship between Warford and Miller. Furthermore, the witnesses who know anything about the recruitment, outside

of Miller and Warford, will be effectively precluded from testifying or being cross-examined. These would include Miller's mother, father, stepfather, high school coach, best friend, girlfriend, Roy Chipman, Jimmy Gay, Stewart and Eyster. While Warford claims Appellees should have talked to these people prior to publication, he now seeks to make their testimony unavailable to the jury. Exclusion of the evidence will eliminate the context surrounding Warford's statements, result in an artificial presentation of the case and cause the jury to be misled.

Four grounds support the admission of the evidence relating to Eyster and Stewart. First, this evidence is clearly beyond the scope of the "other bad acts" rule because it is a part of Warford's overall recruitment of Steve Miller and is inextricably intertwined with evidence of his offer of money to Miller.[1] Second, even if this evidence involves "other bad acts," it satisfies established exceptions to the rule. It is clearly relevant to the issues of (1) Warford's intention, (2) Miller's lack of mistake in construing Warford's statements, and (3) Warford's plan to recruit Miller with offers of money. Third, admission of this testimony is not unfairly prejudicial. Fourth, excluding the evidence has the effect of impermissibly restricting Appellees' ability to prove truth.

Additionally, this Court should not now rule that the evidence is improper under any circumstances. On

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[1] The Court acknowledged "Appellees counter that the other acts were 'inextricably tied' to the ultimate issue of truth" (Opinion of the Court by Justice Lambert [hereinafter referred to as "Opinion"] at 39), but went no further in its analysis.

remand, Plaintiff may "open the door" or other issues may arise. This Court should give guidance to the trial court rather than make an advance ruling without a record of the retrial before it.

Finally, the Court's present Opinion will alter prior, well settled Kentucky law on the above issues. The present ruling will dramatically change civil and criminal litigation in the areas of conspiracy, fraud and other "scheme oriented" cases.

ARGUMENT

A. The Evidence is Inextricably Intertwined With the Conduct in Question

The Court ruled this evidence should be excluded because it related to other bad acts that were extrinsic to Warford's offer of money. Yet, the evidence goes directly to the truth of whether Warford offered Miller money. It shows that Warford's scheme to recruit Miller included the use of recruiting aides to assist him in making various improper money offers to Miller. Recruiting aides were a crucial part of Warford's overall plan to recruit Miller, as were suggestions of "splitting raises." Where evidence of an act is inextricably intertwined with the conduct which is the subject of the litigation, that act is not extrinsic evidence and the "other acts" rule "is not implicated." *United States v. Holmes*, 822 F.2d 802, 805 (8th Cir. 1987); *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985).

There is nothing "extrinsic" about the evidence of Warford's use of Eyster and Stewart:

> An act cannot be characterized as an extrinsic act when the evidence concerning that act and the evidence used to prove the [conduct which is the subject of the litigation] are inextricably intertwined. (citations omitted).

United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979).[2] To decide whether the evidence is extrinsic or inextricably intertwined with the conduct in question, the Court must determine whether the testimony concerning such evidence "would have been incomplete and confusing" without it. *United States v. Aleman*, 592 F.2d at 885. To understand and evaluate the discussion of "splitting a raise," the jury must hear about the entire recruitment to decide if Warford in fact was offering Miller money as Appellees reported.

Warford admits that the subject of a raise came up with Miller, but contends that Miller misinterpreted his statements as an offer of money. The jury can understand why Miller construed the statements as he did only if it knows everything he knew at the time. Exclusion of the evidence of recruiting aides will certainly "create a gap in the jury's understanding" of the matter in dispute. *United States v. Holmes*, 822 F.2d at 806. This "gap" is widened because the Court's ruling in effect precludes almost

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[2] It is significant to note that most authorities are criminal cases. Even though the courts are extremely sensitive to the need to protect the rights of a defendant in a criminal trial, they nonetheless have found such evidence to be admissible. If it is admissible in the criminal context, it certainly should be admissible in the civil context, where the potential consequences are greatly reduced.

everyone who knows anything about the recruitment from testifying.

Evidence of Warford's use of recruiting aides and his offers of money made through them is "so blended or connected" with his offer to split his raise with Miller that it "explains the circumstances" of such offer. *Cf. United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir.), *cert. denied*, 479 U.S. 869 (1986); *United States v. Two Eagle*, 633 F.2d 93, 96 (8th Cir. 1970). This evidence is necessary to "give the jury a total picture" of Warford's recruiting of Miller, *Cf. United States v. Ball*, 868 F.2d 984, 988 (8th Cir. 1989), and to "complete the story." *United States v. Robinson*, 782 F.2d 128, 130 (8th Cir. 1986).[3]

This Court has similarly recognized the necessity for evidence of events which are inextricably intertwined with the event in dispute and has held such evidence to be admissible. *See Fleming v. Commonwealth*, 284 Ky. 209, 144 S.W.2d 220, 221 (1940) (evidence of other acts which are "so interwoven with the one being tried that they cannot well be segregated" is admissible); *Ware v. Commonwealth*, Ky., 537 S.W.2d 174, 179 (1976) ("evidence that provides the necessary perspective" is admissible); *Caldwell v. Commonwealth*, Ky., 503 S.W.2d 485, 489 (1972) (evidence of act is admissible "if so interwoven as to make it necessary and appropriate to mention."); and R. Lawson, *Kentucky Evidence Law Handbook* (2d ed. 1984) § 2.20(B) at 36.

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[3] *See also United States v. Williford*, 764 F.2d 1493 (11th Cir. 1985); *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982); *United States v. Derring*, 592 F.2d 1003 (8th Cir. 1979) and *United States v. Robbins*, 613 F.2d 688 (8th Cir. 1976).

The trial court stated that it did not view the Eyster/Stewart evidence to be "other acts." (See Appellees' Brief at 48 n.18) The trial court clearly did not abuse its discretion in viewing the evidence in this manner. *See e.g., U.S. v. DeLuna*, 763 F.2d at 912-16. This Court failed to review the evidence in its appropriate context and did not consider whether the testimony concerning the use of Eyster and Stewart was so interwoven with Warford's offer to money to Miller as to take it outside the scope of the "other acts" rule. Additionally, this Court failed to accord proper deference to the trial court's ruling. Appellees respectfully urge, therefore, that rehearing be granted.

B. Even if the Evidence is Deemed to be "Other Acts", it is Admissible to Prove Intent, Lack of Mistake, and Plan

In applying the other bad acts rule to exclude the evidence at issue, this Court failed to consider pertinent exceptions to the rule.[4] The evidence is admissible to prove intent, lack of mistake, and plan, all of which are recognized exceptions to the other bad acts rule.

The evidence at issue goes directly to Warford's intent and, correspondingly, Miller's lack of mistake in

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[4] The Court seemed to place undue significance on the issue of motive. It was not Appellees' intent to introduce this testimony as proof of motive, nor was the evidence to be used to establish Warford's character or his general recruiting practices. While the decision in *Holdaway Drugs, Inc. v. Braden*, Ky., 582 S.W.2d 646 (1979), which turned on the issue of motive, was cited in Appellees' brief, it was only to demonstrate that Kentucky has adopted a rule of evidence paralleling Fed. R. Evid. 404(b).

concluding that Warford's statement was an offer of money. Kentucky courts have held that similar acts or representations made at about the same time as the one in question are relevant to establish intent. *National Council of the Knights and Ladies of Security v. Rowell*, 276 Ky. 335, 123 S.W.2d 1041, 1044 (1939). *See also*, R. Lawson, *Kentucky Evidence Law Handbook* (2d ed. 1984) §2.20(C) at 26. Intent is particularly significant in this case, since Warford admits his raise was mentioned, but denies it was an offer of money. He contended that Miller misunderstood his statements or made a mistake. Appellees are entitled to prove that Warford's intent in making these statements was to offer money, just as that was his intent in the offers involving his recruiting aides, Eyster and Stewart.

Warford had a well-defined scheme to recruit Miller through offers of money. The testimony concerning the use of Stewart and Eyster as recruiting aides "formed an integral and material part" of the circumstances surrounding the offer to Miller. It proves the plan and is, therefore, admissible. *Cf. United States v. Aleman*, 592 F.2d 881, 886 (5th Cir. 1979).

The Kentucky courts have held that other acts are admissible "to explain or show the purpose and character of the particular transaction under scrutiny." *Tyler-Couch Construction Co. v. Elmore*, Ky., 264 S.W.2d 56, 58 (1954) (evidence admitted because it showed a "continuing course of conduct"). *See also Cook's Adm'r v. Bank Josephine*, 301 Ky. 193, 191 S.W.2d 209, 211 (1948); and R. Lawson, *Kentucky Evidence Law Handbook* (2d ed. 1984) §2.29(C) at 26. Evidence of Warford's use of Eyster and Stewart in making direct and indirect offers of money to

Miller should be ruled admissible here for the same reason.

C. The Evidence is Not Unfairly Prejudicial

The trial court held that the Eyster and Stewart evidence was relevant and admissible to place the communications between Warford and Miller in context. This Court ruled that the probative value of such evidence on the issue of Miller's belief "was far outweighed by its potential for prejudice." (Opinion at 42) In doing so, the Court did not articulate any specific *unfair* prejudice to Warford or reconcile its ruling with the applicable abuse of discretion standard of review.

Kentucky's rule parallels Federal Rule of Evidence 403 which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See* R. Lawson, *Kentucky Evidence Law Handbook* (2d ed. 1984) §2.00 at 20. The main distinction between the state and federal rules is that, as stated in Professor Lawson's Handbook, the Kentucky rule clearly places such evidentiary rulings within the discretion of the trial court. *See Transit Authority of River City v. Vinson*, Ky. App., 703 S.W.2d 482, 487 (1985).

This Court should not overrule the trial court's discretion based on a mere *potential* for prejudice. The trial court concluded that the Eyster/Stewart evidence was sufficiently probative on the relevant issues and that it

should be admitted. That it damages Warford's position on the issues of intent, lack of mistake, and plan, is hardly sufficient to exclude it.

Case law demonstrates that evidence is "unfairly" prejudicial to the opposing party only if it injects into the case something which has "an undue tendency to suggest a decision on an *improper* basis, commonly, though not necessarily, an *emotional* one." Advisory Committee Notes to Fed. R. Evid. 403 (Emphasis added). This was recognized in *Transit Authority of River City v. Vinson*, Ky. App., 703 S.W.2d 482 (1985), where the court addressed the admissibility of a private investigator's report and photographs of the plaintiff. The court, noting that there was nothing "offensive" about the reports or photographs, ruled that the evidence was not unfairly prejudicial and was, therefore, admissible. *Id.* at 487.[5]

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[5] Federal court decisions similarly have recognized the inclusionary nature of the rule. *See Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858, 863 (5th Cir. 1983) ("[B]y restricting the rule to evidence which will cause 'unfair prejudice' the draftsmen meant to caution courts that mere prejudicial effect is not sufficient reason to refuse admission. Probative evidence will frequently be prejudicial to a party, but that does not mean that it will cause the fact finder to ground a decision on an emotional basis."); *Koloda v. General Motors Parts Div., Gen. Motors Corp.*, 716 F.2d 373, 377-378 (6th Cir. 1983) ("In reviewing a decision of a trial court on this issue we must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effects . . . Unfair prejudice . . . is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair'."); *Hines v. Joy Manufacturing Co.*, 850 F.2d 1146, 1154

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The relevance of the Eyster/Stewart evidence is not outweighed by any unfair prejudice. It does not inject anything emotional or inflammatory into the case, but merely discredits Warford's arguments. He contends that Miller's recruitment was uneventful and that any discussion of a raise was an innocent act in an innocent relationship. Evidence which directly contradicts the main thrust of Warford's testimony should not be excluded as more unfairly prejudicial than relevant. The trial court's ruling should be affirmed and the evidence should be admitted in the retrial of this case. At a minimum, this Court should rule that admission of the evidence remains a matter within the trial court's discretion.

D. The Ruling Impermissibly Burdens The Presentation Of Evidence On the Issue Of Truth

The Court in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) held, as a matter of First Amendment law, that "the common law's rule on falsity – that the defendant must bear the burden of proving truth – must

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(6th Cir. 1988) ("The district courts have broad discretion in deciding issues of admissibility under Rule 403. . . . In order to exclude evidence under Rule 403, it must be more than damaging to the adverse party; it must be unfairly prejudicial."); *United States v. Hewes*, 729 F.2d 1302, 1315 (11th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985) ("[T]he extrinsic offenses were not of such a heinous nature that they were likely to incite the jury to an irrational decision. . . . Such irrationality is the primary target of Rule 403, and the possibility of prejudice we therefore consider slight."); *United States v. Schrock*, 855 F.2d 327, 333 (6th Cir. 1988); *Ramos v Liberty Mutual Ins. Co.*, 615 F.2d 334, 340 (5th Cir. 1980); *Rhodes v. Michelin Tire Corp.*, 542 F.Supp. 60, 62-63 (E.D. Ky. 1982).

similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776. It is Warford's burden to prove that the statements made about him were false. The effect of this Court's ruling precluding the admission of evidence of the use of recruiting aides is to deprive the newspaper of the opportunity to present contrary evidence on the issue of the statement's alleged falsity. Such an effect is constitutionally impermissible.

CONCLUSION

Appellees respectfully request that this Court grant this Petition for Rehearing and reconsider its ruling that the evidence relating to Eyster and Stewart is inadmissible.

Respectfully submitted,

Edward O. DeLaney
Kenneth H. Inskeep
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204

Robert F. Houlihan, Jr.
James L. Thomerson
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507
(606) 231-3001

By: /s/ James L. Thomerson
Attorneys for Appellees